THE CONVEYANCER AND PROPERTY LAWYER

VOL. 16, No. 4. JULY—AUGUST, 1952

CONVEYANCER'S NOTEBOOK

Report on H.M. Land Registry for 1951–1952.—The Land Registry is to be congratulated on the results disclosed in the Report on its work for the Financial Year 1951–1952 (H.M. Stationery Office, price 1s.). It is refreshing to find any institution with a staff only 69 per cent. of that of 1938 having an output of 139 per cent. of that of 1938. Practitioners have noticed the appreciable decrease in the time taken for registration: the average time taken for first registrations in compulsory areas has come down from 21 days in 1950 to 15 days at the beginning of this year, and for dealings from 17 to 10.6 days; in non-compulsory areas the average time is rather longer in the case of first registrations but almost the same in the case of dealings. It is true that the cost per transaction has risen over that of the previous year to 18s. 7d. as a result of the general rise in salaries and the price of all materials—what a pity this is not borne in mind by the authorities when solicitors ask for an increase in their fees for Land Registry work!—but this figure compares favourably with the 17s. 3d. per transaction in 1938. Even with the reduction of land registration fees effected in 1950 there is a substantial surplus of £150,000 estimated for the year 1951–52—this covers the Land Charges and Agricultural Credits Departments as well as the Land Registry.

The former practice of including in the land certificate positive covenants contained in instruments of transfer has been revived, but the practice of merely referring to restrictive covenants instead of copying them where they exceed a page is to be deplored. Could not some of the surplus be used to give yet more information in the

land certificate? The report does not mention the fact that the Land Registry no longer insist on the marking of boundaries prior to first registration, but this is worthy of note as another improvement.

It will be remembered that during the course of the inquiry into the proposed extension of compulsory registration to Surrey it was suggested that an advisory body should be set up comprising practitioners and representatives of the Land Registry for the purpose of discussing difficulties and finding the best remedies. The Report notes that the Law Society has now nominated persons to sit on the committee, though the first meeting had not taken place at the date of the Report.

The Report mentions that little use is made of the system of free official searches of the index map. We are rather diffident in suggesting that this facility may be unknown to many people, but it is certainly hard to explain why so little advantage is taken of it. Apart from the map's being the only sure way of discovering whether land is registered or not, it often solves problems of identity which arise on a conveyance inducing first registration.

Land registration has come in for a good deal of criticism in the past and it is only fair to record that the number of applications in respect of non-compulsory areas (110,965 compared with London's 127,420) is an unconscious tribute to the system.

Building Licences.—By the Control of Building Operations (No. 17) Order, 1952 (S.I. 1952, No. 1202), building licences are not required for the year from July 1, 1952, to June 30, 1953, for work not exceeding in all £200. Where a building is divided into "two or more parts which are occupied or constructed for occupation as separate dwellings" each part is treated as a separate building and qualifies for the free allowance of £200, and the remainder of the building qualifies for yet another free allowance. In the case of industrial buildings and farm buildings other than dwelling-houses the limit is £500. In connection with building licences it is a common error to suppose that the free allowance may be added to the amount authorised by licence. This view is taken by some local authorities, and a builder who accepts it may find to his dismay that the owner will refuse to pay for any work in excess of the amount authorised by the licence although well aware of the position. The Court of Appeal held in *J. Dennis & Co., Ltd.* v. *Munn* [1949] 2 K.B. 327, that the free allowance is only permitted for work severable from permitted work in respect of which a licence has been obtained and that the builder must ascertain the extent of the licence at his

peril. An architect is in a more favourable position than a builder, for no licence is necessary in respect of his fees, which are ignored in deciding whether an amount authorised has been exceeded or not (*Young* v. *Buckles* [1952] 1 T.L.R. 271).

The Matrimonial Home Again.—The Englishman's home has become his wife's castle. Two more decisions have strengthened her position. It will be remembered that the Court of Appeal has said that her status in the matrimonial home is that of a licensee under an irrevocable licence which the husband is presumed in law to have conferred on her. The licence is determined by death, divorce or an order of the court. In *Wabe* v. *Taylor* [1952] 2 T.L.R. 264, a landlord sought to obtain possession of premises within the Rent Restrictions Acts occupied by the wife of the tenant on the ground that the wife's licence had been determined automatically on her committing a matrimonial offence. The Court of Appeal held that a matrimonial offence did not automatically bring the licence to an end. As between the husband and wife a matrimonial offence might be a ground for revoking the licence but could not be relied on by a third party. It is a little difficult to see how an irrevocable licence conferred by law can be revoked by the unilateral action of the licensor and, if even further anomalies on this subject are to be avoided, we would have thought that the husband should be under an obligation to obtain an order of the court.

In the other case, *Ferris* v. *Weaver* [1952] 2 All E.R. 233, a husband, wishing to eject his wife from the matrimonial home, conveyed it by way of sale collusively to a friend, who sued the wife in ejectment and relied on *Thompson* v. *Earthy* [1951] 2 K.B. 596 (noted in Vol. 15, p. 271). Even if *Thompson* v. *Earthy* can withstand the recent decisions of the Court of Appeal, it would appear that the purchaser was a bare trustee for the husband who would be bound by the licence. It is not surprising that, in the present state of authorities, the action failed.

Undertaking in Damages.—On getting an interlocutory injunction the applicant is always obliged to give an undertaking in damages. Where there is doubt as to the applicant's ability to pay any damages subsequently awarded to the respondent, the latter's position is not enviable. In *Baxter* v. *Claydon* [1952] W.N. 376, Roxburgh J. introduced an innovation to give teeth to the undertaking. When granting the injunction he ordered the applicant to

lodge £300 as security to back the undertaking. He indicated that he did not think the innovation should be complicated by permitting evidence as to probable damage to be adduced. If the probability of substantial damage was not obvious the security should be refused. With respect, we think the innovation may well prove a useful protection against impecunious litigants whose position is at the moment extremely strong where they hold legal aid certificates.

The Law Reform Committee.—A correspondent suggests that we should urge our readers to send suggestions for the attention of the Law Reform Committee recently set up by the Lord Chancellor. "We have," he says, "complained for years that reform is needed and I hope the matter will not go by default." He has suggested to the Committee that a so-called underlease for the residue of the term of the lease should not operate as an assignment if the covenants and other terms of the underlease and lease differ (as they nearly always do). So much law affecting conveyancers is now statutory that a good deal of our complaints are inappropriate for consideration, but the Committee is well represented by the Chancery bar and we have our opportunity. The unsatisfactory position with regard to licences might well receive attention. Any suggestions should be addressed to: The Secretary, Law Reform Committee, Lord Chancellor's Office, House of Lords, S.W.1.

ACQUISITION OF A BUSINESS—THE TAXATION ASPECT

By C. N. Beattie, Barrister-at-Law

A purchaser who is negotiating for the acquisition of a business must be on guard not to concentrate his mind solely on the question of the value of the business to the exclusion of the taxation consequences which may flow from the purchase. This is particularly important where the business is owned by a company and the offer takes the form, not of a sale of the business by the company, but a sale of the shares by the shareholders. It might seem very much the same thing to acquire an entire business as to acquire all the shares of the company which owns the business. But in general the risks involved in buying all the shares are greater than in buying the business, and caution is necessary when those concerned for the prospective vendors show a disinclination to carry through the deal except by a sale of shares.

An accountant should invariably be instructed to advise on the acquisition, and his advice should keep the purchaser clear of taxation pitfalls. But the solicitor who is approving the sale agreement on behalf of the purchaser should be careful to see that the agreement is so framed as adequately to protect the client's interests.

Purchase of a Business

Where there is to be a purchase of a business (as distinct from shares) the chief matters to which attention should be directed in relation to taxation are: (a) computation of profits of a newly acquired business; (b) the price to be paid for the stock-in-trade; (c) the price to be paid for assets which attract capital allowances; (d) stamp duty.

(a) *Computation of profits.* Where the purchaser succeeds to the business previously carried on by the vendor, the business is treated as one which has been newly set up by the purchaser (Income Tax Act, 1952, s. 145 (2)). In consequence the profits, instead of being assessed on the basis of the profits made in the preceding year, as is the rule in the case of businesses continuing in the same proprietorship, are assessed as follows. For the tax year in which the business is acquired, assessment is on the actual

profits made in that tax year; for the next year, on the profits of the first period of one year (section 128); and for the third year on the preceding year basis (unless the purchaser elects to be assessed on the basis of his actual profits of the second and third tax years (section 129)). By reason of these rules it is advantageous to show as little profit as possible in the first 12 months after the acquisition, and a judicious choice of date for the transfer may assist.

It must be borne in mind that an agreement cannot be backdated so as to have any retrospective effect on the taxation position of the parties. For instance, if the vending agreement or other form of transfer were dated June 1, and were expressed to be a sale as from the previous March 1, it being agreed that profits from that date were to belong to the purchaser, those profits would be the vendor's and not the purchaser's, for tax purposes. The purchaser's trade would begin on June 1 and not on March 1. It would be otherwise if there were a concluded agreement made on or before March 1, its terms not having been reduced to writing until June 1.

Sometimes it is unsatisfactory for the purchaser to be assessed on the profits of his acquisition as a newly set up business. This is so where he is already carrying on a business of a similar kind and intends to merge the acquired business in his existing business. It would be advantageous to him to be able to treat the acquisition as being that of assets only, added to his existing business. Since his existing business would be assessable on the preceding year basis, additional profits made from the added assets would not fall into assessment until the year after they were made. If his existing business had incurred losses, those losses could be brought forward against future profits, notwithstanding that the profits accrued from the acquired assets. These advantages would not be obtained by succeeding to a business as a going concern, because the existing business and the newly acquired business would be treated separately for tax purposes as long as the separation was relevant, notwithstanding that they might have been merged in fact (*Briton Steel Ferry Co., Ltd.* v. *Barry* [1940] 1 K.B. 463). In most cases where it is intended to purchase a business, it is not possible to carry through the transaction in a form which will prevent succession thereto, with consequent treatment on the newly set up basis. But in those cases where all that interests the purchaser is to acquire the assets of the old business on a break-up basis, and not as a going concern with goodwill, the agreement should specifically be one for the transfer of assets and not for the sale of a business. Where the transaction is so carried through

that there is doubt as to which has been done, it will not avail that the transaction is described as a transfer of assets if it is in reality the acquisition of a business, for it is always a question of fact, to be answered on the evidence, as to the nature of any transaction, regardless of what name may be given to it.

(b) *Stock-in-trade.* The price to be paid for stock-in-trade is important, as the price will be deductible in computing the purchaser's profits for assessment to tax. Where one entire sum is agreed for the entire business, including stock-in-trade, the parties should agree how much of the purchase price is to be apportioned to that item; otherwise the true price may have to be determined, in the event of dispute, by an appeal to the commissioners (see, for example, *Steel Barrel Co., Ltd.* v. *Osborne* [1942] 1 All E.R. 634). The purchaser will be interested to allocate as much as possible of the sum to stock-in-trade, the vendor as little as possible.

(c) *Capital assets.* The incurring of capital expenditure on the provision of certain assets, notably machinery and plant, entitles the purchaser to annual capital allowances, and ultimately entitles him to a balancing allowance or makes him liable to a balancing charge. It is in the purchaser's interest so far as tax is concerned, to allocate as much as possible of the purchase price to such assets; the vendor's interest is that the price should be low. The parties should therefore agree the price of the assets separately. If they do not, but simply agree an entire sum for the entire business, a just apportionment will afterwards have to be made. Indeed, even if they do agree a separate price for the capital assets, it is still open to the tax authorities to allocate a different figure, if a just apportionment of the aggregate price so requires (Income Tax Act, 1952, s. 326). Disputes as to apportionments are determined by the General Commissioners, unless all parties concerned agree that the matter should go before the Special Commissioners (section 329).

(d) *Stamp duty.* The question of stamp duty on the documents giving effect to the purchase is important. An impression sometimes prevails that a contract of sale carries only a sixpenny stamp. That is true of a contract for the sale of land, but in the case of most other kinds of property the duty is *ad valorem* at the conveyance rate of £2 per cent. (Stamp Act, 1891, s. 59). In connection with the sale of a business it is particularly worthy of notice that goodwill, book debts and the benefit of contracts attract *ad valorem* duty. Goods and stock capable of passing by delivery do not. In consequence a tendency sometimes appears to allocate an undue proportion of the purchase price to such items as loose

machinery and plant and stock-in-trade. To do this, if it does not represent the true bargain between the parties, is improper, and in any event the vendor would be wise to resist it, for acceding to the purchaser's desire to avoid stamp duty may involve the vendor in a loss of balancing allowances or heavier balancing charges on the machinery and plant sold, and a higher assessment to income tax for the final year of his business as a result of selling his stock at an unduly high figure.

To save paying stamp duty on the value of the book debts owing to the business, it is common practice for the purchaser not to take over the book debts, but to agree to collect them as agent for the vendor, the purchase price of the business being adjusted accordingly.

PURCHASE OF SHARES

Entirely different considerations arise when the purchaser is acquiring all the shares in a company carrying on a business (subject, of course, to the requirements of the Companies Act, 1948, as to minimum number of members of a company). In that case the company continues its existence as a distinct legal entity, owning and carrying on its business both before and after the transfer so that no question of any assessment of profits on the basis of a newly set up business arises. Losses which the company has incurred can be carried forward against profits which it may make in the future, notwithstanding the changes in the ownership of the shares. This question of past losses incurred by the business is, incidentally, often a reason why shares are acquired instead of the business itself. If the business were to pass into new ownership, its past losses could not be brought forward by the new proprietor.

The dangers that face the purchaser of the shares are that, with his purchase, he acquires, so to speak, all the past history of the company. Existing liabilities, whether disclosed or not, continue to be the responsibility of the company. The purchaser can and should ask for indemnities against undisclosed liabilities, including any outstanding tax, whether assessed or so far unassessed, but the worth of such will depend on the vendor's standing.

The principal risks from the taxation point of view are:—

(a) In the past the company may have failed to make a true disclosure of its profits in its returns, and any back duty that may later be claimed and any penalties would fall on the company.

(b) The company may be potentially liable to a surtax direction on its undistributed profits, under Income Tax Act, 1952, s. 245,

which might extend back over the past six years. A withdrawal of cash from the company by the new proprietor might lead to loss of the protection afforded by the present-day concessionary practice of not making surtax directions in the case of trading companies which continue to pay at least the same amount in dividend as previously. Protection against this particular danger can be obtained by the purchaser's insisting that the vendor obtains before completion a clearance under section 252 of the Act.

(c) The company in the past will probably have distributed as dividend less than the full amount of its profits as computed for profits tax purposes and have obtained non-distribution relief on the deficiency. Any attempt by the new proprietor to take out of the company greater sums than the amount of its current profits will lead to a distribution charge whose only limit will be tax on the amount on which non-distribution relief has been given in the past. This burden will inevitably fall on the new proprietor if he liquidates the company and receives in the liquidation sums greater than the paid up capital of the company.

(d) In cases where the value of the company's stock-in-trade, as fixed in computing the company's profits for assessment to tax, stands well below its true market value, the company's assessable profits on subsequent sales may be heavy through the unduly wide gap between valuation and price realised. The purchaser of the shares should bear this in mind when he takes the factor of stock value into account in fixing the price which he is prepared to pay for the shares. Even if the company refrains from selling, and the purchaser of the shares liquidates the company and takes over the stock himself, the profits of the final period of the company's trading will be computed as though the stock had been sold at its market value (Income Tax Act, 1952, s. 143). This may be illustrated as follows. Suppose that a property dealing company, which is liable to tax on any profits which it may make from dealing in land, now owns only a single property which it bought at a low price and which stands at cost in the company's accounts as settled for tax purposes. A prospective purchaser wishes to buy the property from the comany, but he is offered instead all the company's shares. If he buys the shares as a means of acquiring the property, and then proceeds to liquidate the company, the company will be involved in income tax and profits tax liability as though it had sold the property at its market value.

(e) Estate duty on the company's assets under Finance Act, 1940, s. 46, may be outstanding.

GENERALLY

In the above summary of points to be borne in mind on the purchase of a business or shares, the impact of the new excess profits levy has not been considered, nor has any attempt been made to deal with the different tax treatment which may apply where the sale in question is not one at arm's length, but is between companies or partnerships under common control or between associated persons.

RENTCHARGES AND CONVEYANCING

By E. O. Walford, ll.d., Solicitor

The preference of the public for freehold rather than leasehold interests is well known. In the south of England, however, a freehold subject to a rentcharge is almost a phenomenon, the practice being to grant leases for 99 or even 999 years in cases where it is desired to reserve an annual payment, and thus to keep the purchase price within the range of a larger class. In addition there are of course, many types of case in which large estate owners make a practice of creating leasehold interests for lengthy terms, even where their interest is a freehold one and the lessee is constructing a house or houses or other buildings upon the land.

At the moment, there is undoubtedly a very restricted market for houses of the larger type, and those who do wish to buy such a house will normally prefer to acquire the freehold. It is therefore possible that a practice may arise of offering the freehold of houses subject to a rentcharge, in cases where the buyer does not wish to commit himself to the price of the unincumbered freehold and objects to a leasehold interest but is willing to purchase the freehold subject to a rentcharge. In such a case if the vendor notionally fixes, say, 5 per cent. as a reasonable return he can, without crippling the deal, reduce the capital sum to be paid for the house by a substantial amount. Thus, if a house (freehold) is worth, say, £5,000, but the prospective buyer does not wish to pay more than £4,500, the price could be reduced to that price on the footing that a yearly rentcharge of £25 should be paid by the buyer. As tax will be deductible from all payments of the rentcharge, and as it seems unlikely, for many years to come, that the present standard rate of income tax will be materially reduced, the proposition may perhaps be rendered more attractive by stating the net position after deduction of tax. In the case mentioned above the net annual payment by a person liable to pay tax at the standard rate would be as follows.

	£	s.	d.	
Rentcharge	25	0	0	per annum
Less Tax @ 9s. 6d.	11	17	6	
	£13	2	6	per annum

On a 5 per cent. basis this would enable the vendor to reduce the price by £500. Possibly a purchaser might wish to have the right to redeem the rentcharge by paying £500, and it is thought that many vendors would be prepared to concede this right by granting an option to redeem within a certain period, though some might not wish to permit the security to remain too long in a nebulous condition, and others might object on the ground that the value of money cannot be gauged for any substantial future period.

As rentcharges are rare birds in London and indeed in the southern part of England, it has been suggested that an article dealing with that type of security, with particular reference to conveyancing, might be welcome.

Nature of a Rentcharge

The grant of a rentcharge in possession issuing out of or charged on land in perpetuity (or for a term of years absolute) confers on the grantee a legal estate, L. P. A. 1925 s. 1 (2) (b); and if the grant confers on the grantee a right of entry for any purpose, (as it often does), that right of entry will also confer on the grantee a legal estate, *ibid*, paragraph (e).

A rentcharge granted for money value is, therefore, free from the defect to which voluntary charges or charges by way of family arrangement or in consideration of marriage are subject, namely that the result is to create a settlement under the Settled Land Act, 1925, so that such a charge takes effect as an equitable interest only.

Remedies

A client whether contemplating the sale or purchase of a property subject to a rentcharge will wish to know what will happen if the rentcharge is not paid.

The vendor must of course restrict the amount of the rentcharge to a sum which he is confident he will be able to collect from the rent derivable from the land and premises subject to the charge, although if a watch is not kept on the property it is always possible that it may eventually be reduced to such a state of dilapidation that it is valueless except as a site. It is believed also that there are a number of cases in which buildings have been completely destroyed by enemy action, and owing to the inability of the landowner to rebuild, the security is of little value. However, in the case of a normal mortgage a similar position could arise.

Special provisions for the payment of compensation, and in certain cases for the reduction of rentcharges in case of war damage are contained in the War Damage Act, 1943.

The remedies of the owner of a legal rentcharge are as follows:—

(1) *Action on the covenant*

In the case of a lease, the persons from time to time holding the term of years are liable to the then landlord for rent and also in respect of any breach of covenant to repair or of any other covenant touching and covering the land. This is not so in the case of a rentcharge which contains similar covenants. As *terre tenant*, the landowner from time to time is liable to pay the rent *Thomas* v. *Sylvester* (1873) L.R. 8 Q.B. 368; *Pertwee* v. *Townsend* [1896] 2 Q.B. 129, independently of any covenant; but he is not liable under repairing or under other covenants *Haywood* v. *Brunswick Building Society* (1881) 8 Q.B.D. 403; *Grant* v. *Edmondson* [1931] 1 Ch. 1.

It is no solution for each successive owner of the rentcharge to obtain an assignment of the benefit of the covenants, as that course does not cause the burden to run with the land which is charged with the rentcharge. It will therefore be seen that the owner or assignee of a rentcharge will be unable *by direct means* after assignment of the land to force the assignee to repair the property or pay for such repair.

Before 1926 a mortgagee holding the freehold as such was held liable as *terre tenant* to pay the rentcharge affecting the mortgaged property, *Cundiff* v. *Fitzsimmons* [1911] 1 K.B. 513; but now that all legal mortgages take effect by way of demise or legal charge this point could not arise. It is only the person holding the freehold who is liable for the rentcharge as *terre tenant*: leaseholders of land subject to rentcharges are not so liable. *Re Herbage Rents* [1896] 2 Ch. 811.

(2) *Statutory remedies*

These are contained in section 121 of the L. P. A., 1925, and deal only with recovery of arrears of the rentcharge, and not with other covenants or rights of re-entry.

Shortly the remedies are as follows:—

(a) Distress if the rentcharge is in arrear for 21 days.

(b) Possession and receipt of rents if it is in arrear for 40 days.

(c) Alternatively, if the rent is in arrear for 40 days the grantee or his assignee can demise the land to a trustee

upon trust by mortgage sale or other reasonable means to raise the arrears and expenses. It will be noted that this device of the grant of a term is merely for the purpose of collecting arrears and has no connection with any right of re-entry expressly conferred by the deed creating the rentcharge.

(3) *Re-entry*

As the burden of covenants to repair or to do other works or positive acts upon the land cannot be made to run with the land subject to the rentcharge it may not be considered satisfactory to a rentcharge owner that the owner for the time being of the land should be in a position to retain the land and to allow it to become ruinous, thus rendering the rentcharge valueless or, at any rate, a less desirable security. The appropriate provision to keep the owner of the burdened land up to the mark in the matter of the performance of his repairing or other covenants is by way of a proviso for re-entry on breach of those covenants, though it may be reasonable so to word the proviso that the owner of the rentcharge is required to give written notice to the landowner specifying the default, and deferring re-entry for a specified period to enable the default to be made good if it is capable of remedy. However, at the present day this aspect of the matter is somewhat complicated by the impossibility of effecting substantial building work without a licence, and difficulty in obtaining such a licence.

The Perpetuity Rule

If such a power of re-entry is to be inserted care must be taken to ensure that it does not run counter to the rule against perpetuities. Whilst a power of re-entry on non-payment of the rentcharge is not affected by that rule, by reason of the provisions of sections 1 (2) (e), 4 (3), and 121 of the L. P. A., 1925, a power of re-entry upon breach of any condition or covenant will be void if it is exercisable beyond the period allowed by the rule. The usual conveyancing device must therefore be employed to confine the period during which the power of re-entry can be exercised so as to keep within that rule.

Land Improvement Rentcharges

It can hardly be doubted that there are vast numbers of houses in existence at the present day which are in need of works of improvement. The provisions of the Improvement of Land Act, 1864, and subsequent Acts may not be very widely known, although

the facilities for improvement of land contained in sections 83-89 of the Settled Land Act, 1925, may be familiar to those accustomed to dealing with settled estates, and those accustomed to dealings with agricultural land will be aware of the powers under the Improvement of Land Act, 1864 of the Agricultural Mortgage Corporation to lend money for the improvement of land for agricultural purposes.

Under the Improvement of Land Acts, 1864 and 1899, landowners (broadly speaking freeholders, tenants for life and long term lessees) were enabled on completing approved improvements to obtain a charge by way of rentcharge for a term of years not exceeding 40 upon the land the subject of the rentcharge by way of recoupment of the expense of the improvement, such rentcharge being payable half-yearly. The charge requires an *ad valorem* stamp as if it were a mortgage for the total principal sum payable under the charge. That principal sum is specified, the half-yearly payments being referred to as a proportionate payment of the sum with interest at a specified rate. The charge is embodied in what is termed an Absolute Order.

Lands Improvement Company

So much as to the rentcharge; but what of the raising of the money to effect the improvement ? In appropriate cases it may be possible to obtain the necessary sum from the Lands Improvement Company, an incorporated body. The procedure is similar to that laid down in the above-mentioned Act; but the charge created by the Absolute Order is in favour of the Company and not the landowner.

The Company's remedies are limited to those specified in section 121 of the L. P. A., 1925 (noted briefly above).

Those wishing to follow up this matter can obtain forms from the Company.

Perusal of section 9 of the Improvement of Land Act, 1864 and of sections 83-89 of the Settled Land Act, 1925, will reveal the nature of the works which constitute improvements for this purpose. It should be observed that all the works constituting improvements within sections 83-89 of the Settled Land Act, 1925, have been brought within the Act of 1864, regardless of the question whether the landowner is a tenant for life or whether there is, in fact, a Settled Land Act settlement affecting the land.

The subject of Land Improvement and the procedure in order to obtain a rentcharge securing the repayment of moneys expended on improvements is fully dealt with in Vol. 7 of the Encyclopaedia

of Forms at p. 682 *et seq.* where a full list of improvements to which that procedure applies will be found.

The rentcharge created under the procedure above-mentioned is required to be registered as a Class A land charge, by virtue of section 10 of the Land Charges Act, 1925; but a *legal* rentcharge privately created does not require registration as a land charge. It is by deed, and is therefore expressly excluded from Class A: moreover it is a legal estate, though it is not a legal mortgage within Class C (1): see Land Charges Act, s. 10, "Class C."

THE ORDER OF APPLICATION OF ASSETS

By G. Boughen Graham, ll.b., Barrister-at-Law

The fable related hereunder not only illustrates how the cases on the order of application of the assets of a deceased person's estate appear to operate in practice. It also contains a moral, if not more than one moral, for all who are engaged in the difficult task of drawing wills.

The Three Testatrices and the Three Solicitors

There were three maiden ladies, the Misses Snap, whose only living relatives were four in number; a niece Miss Eclair of whom they strongly disapproved and three young cousins Mr. Plum Cake, Mr. Apple Cake and Mr. Seed Cake. The three ladies each shared a profound admiration for their local vicar, Canon Sugarbowl, and, curiously, each employed a different solicitor. They conferred together about their wills and each decided to ask her solicitor to be her executor and to leave him £500 for his trouble, each decided to leave £15,000 to the worthy Canon and, subject thereto, each would leave her estate to the three Cakes in equal shares.

Each solicitor prepared a will for his client. Each will consisted of three clauses. Clauses 1 and 2 were, as it happened, identical in each case, clause 1 appointing the executor and providing for his legacy, clause 2 bequeathing £15,000 to the Canon. The third clause, however, differed in each case. In Miss Snap's will clause 3 provided that the whole estate should go to the executor upon trust to sell, etc., and out of the proceeds to pay debts, testamentary expenses, death duties and the legacies and to hold the balance for the three Cakes in equal shares. Miss Brandy Snap's solicitor saw no need for a trust for sale where there were no successive interests and so in her will clause 3 simply bequeathed the residue of her estate to the Cakes in equal shares. Miss Ginger Snap's solicitor had a rather old fashioned respect for realty and so in that will clause 3 provided that the testatrix devised all her real estate and bequeathed the residue of her personal estate to the Cakes in equal shares.

The Misses Snap died on the same day. Each was found to be seised of realty to the value of £45,000 and to be possessed of personalty to the value of £5,000. Each owed debts totalling

£6,000. It was found, in the interests of arithmetical convenience, that estate duty was at 30 per cent., that all assets realised their probate values and that there were no costs of administration. Unfortunately it was also found that Mr. Seed Cake had for some time past been feeling more and more seedy and had in fact predeceased the Misses Snap by a few days.

Miss Snap's solicitor observed (i) that the will was in similar terms to the will in *Re Petty* (see *post*, p. 261), so that the statutory order was excluded; (ii) that the will created a mixed fund and expressly charged the legacies on it so that they were payable out of realty and personalty rateably; (iii) that the legacies would have borne their share of estate duty on the realty had not that duty been expressly thrown on the mixed fund. He therefore realised assets to a total of £36,500 to discharge estate duty £15,000, debts £6,000 and legacies £15,500. He was then left with assets to the value of £14,500 which he divided into three shares of £4,833 each which went one to each of the surviving Cakes and one to Miss Eclair who was entitled as next-of-kin.

Miss Brandy Snap's solicitor observed (i) that the will was similar in terms to that in *Re Lamb* (see *post*, p. 261), so that the statutory order applied; (ii) that one-third of the estate was undisposed of by will and that that one-third amounted to £17,000, made up of £15,000 realty and £2,000 personalty; (iii) that the legacies were not expressly charged upon the mixed fund. He then turned to *Re Anstead* (see *post*, p. 268) for judicial guidance as to how to proceed. He found that he had first to set aside a fund for the legacies exhausting available personalty before turning to realty. He therefore set aside £15,500 for legacies, which fund was made up of £13,500 realty and £2,000 personalty; he was left with £1,500 undisposed of. He still had to find £6,000 for debts and £15,000 for estate duty; the legacies had been satisfied as to £13,500 out of realty and to this extent had to bear their own duty at 30 per cent. which amounted to £4,050. Hence, the legacy fund stood at £11,450 (£13,500 less £4,050) and the legacies had to abate accordingly. There still remained to be found £16,950 (debts £6,000; estate duty £10,950); £1,500 was available from the undisposed of realty but this exhausted the funds undisposed of and he passed to property included in a residuary gift. This amounted to £34,000 and when the outstanding £15,450 had been paid thereout there remained £18,550, which was distributable between the two surviving Cakes.

Miss Ginger Snap's solicitor made the same observations as did Miss Brandy Snap's, but in addition observed that in his case clause 3 was in exactly the same terms as that in *Re Rowe* (see

post, p. 268), and accordingly he followed that decision. He therefore set aside the whole of the personalty which was undisposed of by will (*i.e.*, £2,000) towards the legacies. He thus had undisposed-of realty amounting to £15,000 to meet in part the debts and estate duty; hence, when that fund was exhausted he still had £6,000 to find. Accordingly, he passed on to the property included in the residuary gift. This totalled £34,000, being £30,000 realty and £4,000 personalty. He therefore, as directed, set aside the £4,000 towards the pecuniary legacies and was a little disturbed to find that since that was the whole of the personalty it was all that was available for the pecuniary legatees. He was thus left with £30,000 realty out of which he satisfied the outstanding £6,000 and divided the balance between the two Cakes.

When all three estates were distributed the amounts taken by the various beneficiaries were:—

	Miss Snap	Miss B. Snap	Miss G. Snap
	£	£	£
The Executor	500	370	194
Canon Sugarbowl	15,000	11,080	5,806
Miss Eclair	4,834		
Mr. Apple Cake	4,833	9,275	12,000
Mr. Plum Cake	4,833	9,275	12,000
	£30,000	£30,000	£30,000

To a layman the wills appear to be identical and to a lawyer there does not seem, at first sight, to be a great deal of difference between them; hence it was that nobody quite understood what had happened. Miss Eclair was so astonished that her eldest aunt should have left her nearly £5,000 that she did not stop to wonder why the other two had not done the same. Canon Sugarbowl wondered why Miss Ginger had been so much less generous than her sisters. The two Cakes thought the worst of Miss Snap's solicitor and took all their work in the future to Miss Ginger's solicitor, whilst for his own part that poor man resolved to be very careful about drawing wills in the future. His feelings were not improved when his nephew, an impertinent young gentleman, recently called to the Bar, suggested that if his uncle had had the will settled by counsel at his own charge he might have been £300 10s. 0d., or even £302 14s. 6d., in pocket in the end.

The proper application in any given case of the provisions of the Administration of Estates Act, 1925, s. 34 and Sched. I, Part II,* is a matter which has always been one of difficulty; in the 27 years of its existence it has been before the courts on many occasions but one is driven to say that the reported decisions have indicated more difficulties than they have solved. These may be subsumed under two general heads. First, how do the provisions of the Schedule affect the incidence of funeral and testamentary expenses and debts in any given case? The answer to this question is complicated by two factors; for one thing it is provided by section 34 (3) and Sched. I, Part II, para. 8 (a) that the statutory order of application is subject to variation by the provisions of the will and it must always be a matter of construction whether the provisions do amount to a variation. The second factor springs from the existence of Sched. I, Part II, paras. 3 and 4, and on the whole this is probably the most intractable part of the whole matter. Secondly, how far is the incidence of legacies the same as that of debts, etc.?

The two questions are, of course, bound up with each other in the decisions and for this reason it is proposed, after recalling two principles of the old pre-1925 law, to consider the relevant cases in chronological order and then to attempt a tentative appreciation of the position. This mode of treatment will have at least one advantage; those readers who assign no value to the writer's comments will, at any rate, have a convenient digest of the cases.

THE OLD LAW

In considering the effect of the new legislation two principles of the old law should be kept in mind. In *Trethewy* v. *Helyer* (1877) 4 Ch.D. 53 it was decided that where a testator bequeathed his residuary personal estate to a number of persons and one or more of the shares lapsed the debts, etc., were payable out of the estate generally and not out of the lapsed share; Jessel M.R. saying (at p. 56):—

> "There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs you do not arrive at the net residue at all."

The liability of realty, before 1925, for the payment of pecuniary legacies was summarised by Farwell J. in *Re Rowe* [1941] Ch. 343 (at p. 346):—

* All references are to the Administration of Estates Act, 1925, unless otherwise stated.

"Pecuniary legatees, in the absence of express words charging the real estate with the payment of the legacies, had to look to the personal estate and could not look to the real estate for the payment of the legacies, and would therefore have to go short insofar as the personal estate was insufficient to satisfy them, unless the testator had made the residue a mixed fund or given the real and personal estate as a mass to the residuary legatees. In that case the real estate would be charged with the payment of the pecuniary legacies in accordance with what is generally known as the rule in *Greville* v. *Brown* (1859) 7 H.L.C. 689."

The Decisions

Re Lamb; Re Petty; Re Atkinson

The above-quoted proposition of Jessel M.R. appears, with great respect, to be a sound one but, when the matter was first litigated under the new law in *Re Lamb* [1929] 1 Ch. 722, it was held that "property undisposed of by will" was not restricted to property with which no attempt had been made to deal but included property with which the will dealt ineffectively. Hence it was held that expenses and debts were primarily payable out of a lapsed share of residue in exoneration of the shares of residue which were effectively disposed of. But, as stated above, the application of the statutory order is subject to variation by the terms of the will and *Re Petty* [1929] 1 Ch. 726 was distinguished from *Re Lamb*, *supra*, because the testator had there devised and bequeathed his residuary real and personal estate upon trust for sale and conversion and after directing the payment of debts, etc., out of that mixed fund bequeathed the residue thereof, referred to in the will as "the Residuary Trust Fund" in certain shares of which one lapsed; in the earlier case there had been a mere direction for the payment of debts, etc. It was held that the will expressly threw the debts upon the mixed fund and so varied the statutory order. Thus, the effect of the provisions of the will was to restore the old doctrine of *Trethewy* v. *Helyer*, *supra*.

It will be seen that the first question to reach the reports under the new law was whether, in a given case, the statutory order had been varied. *Re Lamb*, *supra*, is authority that a direction by the executors to pay debts, etc., as soon as possible after the testator's death does not amount to a provision varying the statutory order. *Re Petty*, *supra*, shows that the express creation of a mixed fund with a direction to pay funeral and testamentary expenses thereout does amount to such a provision. Another provision which was

held to have ousted the statutory order was found in *Re Atkinson* [1930] 1 Ch. 47 where the testator had directed his executors to pay his funeral and testamentary expenses out of the proceeds of sale and conversion of his personal estate; this was held to exonerate the real estate which was undisposed of by reason of the fact that the devisee had predeceased the testator.

Re Kempthorne

The difficulties inherent in the existence of paras. 3 and 4 of Sched. I, Part II, were first explored when the matter came before Maugham J. (as he then was) and before the Court of Appeal in *Re Kempthorne* [1930] 1 Ch. 269. There the will provided that: "As to all my [personalty] . . . subject to and after payment of my funeral and testamentary expenses and debts and the legacies . . . and the duty on any legacies left free of duty . . . the same shall be divided into seven equal parts." Two of these parts were undisposed of in the events which happened. Maugham J. considered that the statutory order would have been ousted had it not been for the existence of paras. 3 and 4 of Sched. I, Part II. He said (at p. 278):—

> "Now in both these cases [*i.e.*, paras. 3 and 4] it is to be noticed that the legislature is assuming that the testator has by his will specifically appropriated in one case or devised or bequeathed in the other, property for the payment of debts; or that he has charged with the payment of debts specific property, or some property under a general description, or devised or bequeathed property subject to a charge for debts, and I cannot help concluding that those two paragraphs mean that the fact that the testator has done one of those things is not *per se* to constitute a provision in the will which operates to alter the mode of application."

The learned judge went on to hold that in the case before him there was:—

> "An indication that the [personalty] was being bequeathed subject to a charge for payment of debts; for a gift of property subject to payment of debts is a gift of property subject to a charge for the payment of debts . . . within the meaning of . . . para. 4 and I conceive that this is not to affect the circumstance that under para. 1 the property . . . undisposed of . . . is primarily to be applied."

On appeal, Hanworth M.R. discussing this said of paras. 3 and 4 (at pp. 296–7):—

"My own view is that these paragraphs operate where the payment of debts is specifically charged upon some particular property . . . and that they do not operate to override or prevent the creation of a general fund or residue which is to be ascertained, and does not come into being, until after the payment [of the debts, etc.]."

Lawrence L.J. said (at p. 300):—

". . . property included in a residuary gift would have to be exhausted before the property comprised in either the third or fourth item could be resorted to. It follows that the property mentioned in paras. 3 and 4 cannot comprise property included in a residuary gift either under a specific or a general description. The third and fourth items must therefore be read as referring to property other than property included in a residuary gift."

Accordingly, the Court of Appeal, having freed themselves from the difficulties of paras. 3 and 4 held that there was a sufficient provision in the will to oust the statutory order. In *Re Sanger* [1939] 1 Ch. 238, Simonds J. (as he then was) discussing the case said:—

"In *Re Lamb* the testator directed his executors to pay his debts, etc., without specifying out of what estate or fund the payment was to be made and bequeathed legacies and then disposed of the rest, residue and remainder of his estate whilst in *Re Kempthorne* the testator directed that his estate should, after payment of debts, etc., be divided into a number of equal parts . . . In *Re Kempthorne* there was an overriding provision, in *Re Lamb* there was not."

It will be seen that the distinction between the two lines of cases is a fine one and more will have to be said about that hereafter; apart, entirely, from the question what was or was not a sufficient provision in the will having regard to paras. 3 and 4. Lawrence L.J. said of *Re Lamb*, *supra* (at p. 298):—

"I am not at present convinced of the correctness of this decision. The residue of personal estate is what remains after payment of funeral, testamentary and administration expenses, debts and legacies. It is obvious, therefore, that in the case of a lapsed share of residue, there is nothing undisposed of, except what remains after payment of the expenses, debts and legacies; until these are paid there is no net residue at all and it is impossible to see what (if anything) has lapsed. Moreover, the Act is dealing with the application of the assets of the testator; and it is open to question whether a share of residue which does not come into existence and cannot be ascertained until the expenses, debts and legacies are paid can properly be

described as an asset of the testator for the payment of his debts any more than a pecuniary legacy can be so described."

It seems, with respect, that there is a great deal in this point which does not seem to have had the attention it deserves. *Re Lamb* is undoubtedly authority for the proposition that a mere direction to pay debts does not oust the statutory order; it was approved in this sense by the Court of Appeal in *Re Tong* [1930] 1 Ch. 202, but Lawrence L.J.'s above-quoted words were not considered at all. In *Re Cruse* [1930] W.N. 206, Farwell J. reinforced his decision that the statutory order was not excluded by considering them and stated that he shared the feeling that the residue of an estate was what remained after payment of debts, etc. It will be convenient to leave this aspect of the matter for the moment and examine other cases which have been decided.

Re Tong

In *Re Tong* [1930] 2 Ch. 402, Clauson J., after considering the terms of the will, said (at p. 246):—

> "This I construe . . . as a direction to pay the estate duty and the legacies out of the general estate before ascertaining the fund which is the subject-matter of the final gift; but I can find no directions dealing with [debts, etc.] other than and except this estate duty. In order to ascertain how these debts, etc., must be met I must turn to Sched. I, Part II."

In the events which had happened in that case there was an intestacy as to income only, and the decision is chiefly interesting in that it was said that this fact made no difference as the inconvenience of having a fund accruing in the future as the primary fund for the discharge of immediate liabilities could be avoided by discharging them out of the general estate and recouping the sums so paid as income was received. The judgment was upheld by the Court of Appeal at [1931] 1 Ch. 202.

Re Littlewood

Next came *Re Littlewood* [1931] 1 Ch. 443, and in this case the difficulty was in para. 4 of the Schedule. The testatrix, in a will made before 1926, had, in clear terms, expressly charged debts and funeral expenses upon specific bequests and followed this with an absolute gift of residue. Here there was no lapsed share but, of course, residue fell under para. 2 of the Schedule whilst the specific bequests fell squarely under para. 4. Furthermore, the reasoning of Hanworth M.R. and Lawrence L.J. in *Re Kempthorne*, *supra*, was not available. Maugham J. adverted to the difficulties

which he had expressed in *Re Kempthorne, supra*, and said (at p. 446):—

> "I think that I am justified in taking the view that, prima facie, the paragraphs of the schedule are to have effect subject to the provisions of the will of the deceased in cases where there is a reasonably clear indication of the intention of the deceased."

He decided that in the case before him the definitely expressed desire of the testatrix that debts, etc., should be charged upon the specific bequest was sufficient to oust the statutory provisions. There can be no doubt that this decision was in accord with the intention of the testatrix but it is most difficult to harmonise with the statutory provisions. The intention of the testatrix was expressed by charging the debts upon a specific bequest—no clearer expression of intention could be found—but the Schedule makes it equally clear that property so charged is to rank behind residue.

The Legacy Cases

Re Worthington

So far the cases have all been concerned with the incidence of debts and expenses and they cannot be said to have made the rules crystal-clear. The next question which arose is whether or not the statutory order has any application to legacies as distinct from debts and expenses. The starting point for that problem is *Re Worthington* [1933] 1 Ch. 771. There the testatrix, after bequeathing a number of legacies free of duty bequeathed all the residue of her estate to X and Y, one of whom predeceased the testatrix. Bennett J. held that, whilst the debts, etc., were primarily payable out of the lapsed share, the legacies and duties thereon were payable out of the general estate. His judgment is not reported and on the second point he was reversed by the Court of Appeal. The present writer confesses to finding extreme difficulty in appreciating the exact *ratio decidendi* of the judgments and in particular whether the case was decided upon the provisions of section 33 or section 34.

Lord Hanworth M.R. recites the provisions of section 33 (2) and of section 34 (3) and Sched. I, Part II, and proceeds (at p. 775):—

> "Having regard to those sections and the paragraph of Part II of the First Schedule which I have read, is there any reason for the distinction made by Bennett J. between debts and funeral expenses on the one hand and pecuniary legacies on the other? . . . the provisions of the statute indicate that

> unless there is some provision in the will which negatives the prescribed order of administration, that order of administration must apply to both legacies and debt."

With great respect to the learned Master of the Rolls it might be suggested, although it was not suggested in argument, that the reason for the distinction made by Bennett J. is that, whilst section 34 (3) prescribes minutely how debts, expenses, etc., are to be dealt with, it does not in any way whatever mention legacies. If this be borne in mind it is, again with great respect, suggested that Lawrence L.J.'s argument may be open to doubt. He said (at p. 777):—

> "In *Re Kempthorne* the Court of Appeal brought debts into line with legacies. That was the converse case to the present. Here I can see no real difference between debts and legacies, and I think that legacies ought to be brought into line with debts."

Now if it be accepted that section 34 (3) does not deal with legacies (and it has since been so decided in *Re Beaumont* [1950] 2 Ch. 462) what happened in *Re Kempthorne* was that it was held that, in the circumstances there existing, section 34 (3) had no application to debts, and hence debts, in that case, fell into line with legacies which never could be affected by that subsection.

Re Thompson

In *Re Thompson* [1936] Ch. 676 the testator had bequeathed an annuity and certain legacies and then devised and bequeathed all his real and personal estate not otherwise devised or bequeathed between two residuary beneficiaries. The testator's personalty was of itself insufficient to satisfy the legacies but was greatly exceeded by the realty. The question arose whether the legacies were payable primarily out of personalty or rateably out of realty and personalty. Clauson J. quoted *Re Boards* [1895] 1 Ch. 499 as authority for the proposition that:

> "When a testator bequeaths legacies, and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty unless the testator directs that they are to be paid out of the mixed fund, in which case they are paid rateably out of realty and personalty";

and, after examining section 34 and the Schedule, decided that they contained nothing which altered the principle enunciated in *Re Boards, supra*. Hence it was decided that the personalty must be exhausted before recourse is had to the realty. It may be observed

that, had the testator directed payment of a mixed fund, the legacies would have been charged rateably and, on the other hand, had the devise of the realty not been strictly a residuary devise, the legacies would not have been charged on the residue at all: *Re Rowe* [1941] Ch. 343.

Re Sanger

The next case in point of time is *Re Sanger* [1939] Ch. 239. This decision was principally concerned with the question whether or not the statutory order had been excluded, and it is valuable for an illuminating review of the earlier cases by Simonds J. (as he then was). The testatrix bequeathed pecuniary legacies and annuities and provided:—

> "As to all the rest, residue and remainder of my real and personal estate . . . I devise and bequeath the same equally between the following persons. . . ."

The testatrix then directed that all duties payable upon her death should be discharged out of her estate; two of the named persons predeceased her. The learned judge at pp. 248–249 set forth the difficulties he found in distinguishing the earlier cases but decided that the statutory order was applicable and (following *Re Worthington*) that it applied to legacies.

Re Gordon

The facts and decision in *Re Gordon* [1940] Ch. 769 may be sufficiently indicated by quoting the headnote:—

> "A testatrix gave certain specific legacies and a legacy of £50 in trust thereout to pay debts, funeral and testamentary expenses, and to pay any balance remaining to a society. There was no residuary gift.
>
> "*Held*, that there was an intestacy as to residue and there being no direction in the will to vary the statutory order . . . the debts, etc., were primarily payable out of the property undisposed of.
>
> "Ruling of Maugham J. in *Re Kempthorne* applied."

It will be observed that this case was very similar indeed to *Re Littlewood*, *supra*, and that case was referred to in argument but not in the judgment. In the course of argument Mr. A. H. Droop put forward the interesting and valuable suggestion that the two cases were distinguishable because, in the earlier one, the charging of the specific bequest with debts, etc., showed an indication to exonerate the residue, whilst in the later case the testatrix had not attempted to dispose of any residue and hence,

had not shown any intention to exonerate it. This suggestion was taken up by Roxburgh J. in *Re James* [1947] Ch. 256, and is certainly ingenious: whether it is sound is another matter.

Re Owers

Re Owers [1941] Ch. 17 was not directly concerned with section 34 but it is sufficiently close to our subject to be worth noticing. It is hardly necessary to do more than to quote the headnote:—

> "A general direction to pay legacies out of a mixed fund or residue charges them rateably on the portion attributable to realty and personalty. So far as legacies are payable out of the portion attributable to realty they must bear their own estate duty, notwithstanding a direction to pay 'testamentary expenses' out of the mixed fund."

Of course, if the direction were to pay "testamentary expenses and all estate duty payable upon my death" the result would be otherwise.

Re Anstead

The actual point decided in *Re Anstead* [1943] Ch. 161, was not one of great interest but the case is valuable in that Uthwatt J. indicated his views as to how a personal representative should proceed to administer a solvent estate. In this case residuary personalty was insufficient both to satisfy the testator's debts and testamentary expenses (including estate duty on the personalty) and to provide in full for the pecuniary legacies. The testator had created a mixed fund of realty and personalty and hence the pecuniary legatees could (as those in *Re Rowe* could not) look to the real estate. It has been settled by *Re Owers*, *supra*, that, in so far as the legacies were satisfied from realty, they must bear their share of duty on realty and the question which arose was whether, since 1925, these legacies were payable partly out of realty. It was said in argument that if the testator had died before 1926 the legacies would have come partly from realty and partly from personalty and would have borne their share of the duty; that since section 53 (3) (c) and Sched. I, Part II, para. 8 (b) provide that nothing therein should alter the incidence of duties the estate must notionally be administered under the old law for the purpose of incidence.

Re Rowe

In *Re Rowe*, *supra*, a testator bequeathed pecuniary legacies and then proceeded:—

> "I devise all my real estate and bequeath all the residue of my personal estate to X and Y in equal shares."

The personal estate was insufficient to meet the pecuniary legacies but the real estate was amply sufficient for that purpose. Farwell J. considered *Re Thompson*, *supra*, and Sched. I, Part II: he found that there was nothing in the will to create a mixed fund within the principle of *Greville* v. *Brown*, *supra*; his view was that the devise and the bequest, although to the same persons and although, as was pointed out in *Re Ridley* [1950] Ch. 415, contained in the same sentence, were distinct. He found, following *Re Thompson*, *supra*, that the 1925 legislation did nothing to abrogate the authority of *Re Boards*, *supra*, and held that the pecuniary legacies were payable out of the residuary personalty only, and that the devisees took free from any liability to contribute to the legacies.

Re Harland-Peck

Next came *Re Harland-Peck* [1941] Ch. 182. The Court of Appeal considered the words of the will to be almost identical with those in *Re Kempthorne* and followed that decision. The judgment of the court was delivered by Luxmoore L.J., who said that the difficulty expressed by Simonds J. in *Re Sanger*, *supra*, in distinguishing on the one hand a gift of property subject to and after payment of debts, etc., and on the other hand a direction to pay funeral and testamentary expenses and legacies followed by a gift of residue could be solved, because in the first class of case there is an express charge upon the subject-matter of the gift, whilst in the other there is merely a direction to pay the items unsupported by any charge express or implied. The learned Lord Justice would put *Re Petty*, *supra*, *Re Atkinson*, *supra*, *Re Kempthorne*, *supra*, and the case before him in the first category, and *Re Lamb*, *supra*, *Re Tong*, *supra*, *Re Worthington*, *supra*, and *Re Sanger*, *supra*, in the second.

Uthwatt J. said (at p. 164):—

> "The first thing to be done in administering a solvent estate is to set aside out of residue a fund to satisfy the pecuniary legacies. That is the first charge and it is a charge primarily on residuary personalty rather than on residuary real estate: *Re Thompson*. The result is notionally to divide the residue into two separate funds, the first to meet pecuniary legacies (and for the purposes of this fund personal estate is the primary fund and only insofar as it is insufficient is there to be any resort to realty) and a second fund consisting of the balance of the residue, including residuary real estate. In meeting

debts and testamentary expenses the second fund must be exhausted before the first is touched."

The effect of the 1925 legislation on this point is really to reverse the order in which legacies and debts are charged upon residuary personalty. Now, assuming that the estate is solvent, legacies are the first charge; then, debts were the first charge. The argument based upon section 53 (3) (c) was rejected on the ground that it could only be intended *ex majori cautela* to preserve the general rules as to the incidence of duties, which rules must be applied to the facts as they exist under the new law.

Re James

In *Re James* [1947] Ch. 256, the testator left specified property to his executors upon trust as and when the executor should think fit to sell, etc., and after payment of debts, etc., to invest the proceeds in trustee securities, and settled the proceeds of sale for life with remainder over. The residue of his estate he left to his wife absolutely. Roxburgh J. first construed the will without reference to authority and said (at p. 258):—

> "In my opinion, when he directed the bank [the executors] to sell and after payment of debts to invest, he was directing [the bank] to pay the debts; they could not effectively carry out his direction to invest after payment without paying them. Therefore, I should hold that the testator had specifically appropriated or devised or bequeathed property for the payment of debts within the meaning of para. 3 of Sched. I, Part II. Secondly, I should hold that the direction to pay debts out of a particular fund necessarily involved an intention to exonerate some other fund which the testator disposed of in some other part of his will—in other words, necessarily involved an intention to exonerate the residue of his estate."

The learned judge then turned to the authorities to see how far those conclusions could be supported.

He did not find it necessary to linger over the authorities to justify his first conclusion, that is, that the direction was within the first class suggested by Luxmoore L.J. in *Re Harland-Peck*, *supra*, but concentrated upon the difficulties arising from paras. 3 and 4—the second of the three difficulties—first posed by Maugham J. in *Re Kempthorne*, *supra*. Briefly, it may be said that his choice lay between *Re Littlewood*, *supra*, and *Re Gordon*, *supra*, and he examined and discussed those cases together with the above-quoted extract from Maugham J.'s judgment in *Re Kempthorne*, *supra*. He found the key to his decision in the words

"*per se*" in Maugham J.'s remarks and in the argument first advanced by Mr. Droop in argument in *Re Gordon, supra*. At p. 259 apropos of the suggestion that Maugham J.'s words applied the learned judge said:—

> "But in my judgment they do not because in that passage the words '*per se*' seem to me to be of vital importance, and in the present case there is to be found not only a devise or bequest of particular property for the payment of debts but also an intention to exonerate therefrom another category of property disposed of by will, namely, residue."

And at p. 262:—

> "If a testator directs a particular fund to bear debts but make no other disposition, it is, of course, impossible to hold that he intended to exonerate some other fund."

Re Ridley

Re Ridley [1950] Ch. 415 was a case in which there appeared, one way or another almost every point which has been here discussed except the existence of paras. 3 and 4 of the Schedule. It really turned, however, upon the existence or otherwise of an intention to exclude the statutory order. The testatrix gave a number of specific legacies. By clause 6 she made the following devise: "I give free of all death duties all my real estate, which includes Manmead, Covert and Maperton and my advowsons to the said G. N. absolutely." By clause 7 she gave a number of pecuniary legacies. By clause 8 she gave the residue of her property to the said G. N. The personalty was insufficient to meet the expenses (including the estate duty on realty since that was thrown on personalty by clause 6), the debts and the pecuniary legacies so that the latter would have to abate unless something could be thrown onto realty. There was no mixed fund and hence it was admitted that the legacies were payable wholly out of personalty. The argument on behalf of the pecuniary legatees was not that the legacies themselves should be paid in part from the realty but that some part of the debts, expenses, etc., should be thrown onto the realty, thus, as it were, relieving the pressure on the personalty. The basis of the argument was that, having set aside from personalty a fund for the pecuniary legacies (*vide Re Anstead*), the debts, etc., were charged upon "property of the deceased not specifically devised or bequeathed but included . . . in a residuary gift." Now if clause 6 were a residuary gift of realty that realty would take its place alongside the personalty as the fund primarily liable. As Harman J. put it (at p. 420):—

> "This, of course, is most obviously a topsy-turvy result; it defeats every intention that the testatrix has expressed. She wanted the duty on the realty to be paid by the personalty. The result of her will is said to be that duty on the personalty is borne in part by the realty."'

The learned judge found on construction of the will that there was a sufficient intention to exclude the statutory order. He also stated that, if he were wrong in that, he would be prepared to hold that the gift in clause 6 was not, upon a true construction of the will, and following to some extent *Re Rowe*, *supra*, a residuary gift.

Re Beaumont

Re Beaumont [1950] Ch. 462, is a decision upon the application or non-application of the statutory provisions to legacies. The testatrix had bequeathed her whole estate to her trustees upon trust to sell "and after payment of my funeral and testamentary expenses and debts" to stand possessed of the residue for four named persons; one of the four predeceased the testatrix. Now, upon the true construction of the will and upon the authorities there was no doubt that the statutory order was excluded so far as funeral and testamentary expenses and debts were concerned. But the testatrix, before setting up the trust for sale, had bequeathed certain legacies and the question arose out of what fund they were to be paid. So far as they were concerned there was no attempt in the will to vary the statutory order.

On the one hand, it was argued that Sched. I, Part II, applied to the legacies on the authority of *Re Tong*, *supra*, and *Re Worthington*, *supra*, so that they would be payable out of the lapsed share. On the other hand, it was said that section 34 (3) and Sched. I, Part II, make no express or implied mention of legacies; that the only part of the Act that does provide for the payment of legacies is section 33 (2) and that subsection depends upon the statutory trust for sale in section 33 (1), which statutory trust was in the case before the court displaced by the express trust in the will (*Re McKee* [1931] 2 Ch. 145). Hence, since the Administration of Estates Act, 1925, made no provision for the legacies the old law must apply so that the legacies were payable out of the entirety of the personal estate (*Re Thompson* [1936] Ch. 676 and *Re Boards* [1895] 1 Ch. 499). This latter argument was adopted by Danckwerts J. in a short judgment.

It would seem, with respect, that this is a perfectly sound and logical decision upon the provisions of the Act although whether

the legislature's omission to deal with the incidence of legacies in such circumstances was deliberate or accidental is another matter. The real difficulty, as has been stated, is to harmonise the decision with *Re Worthington*, *supra*, which case was mentioned in argument but not in the judgment.

Re Meldrum

The latest case is *Re Meldrum* [1952] 1 All E.R. 274 where the testator, after all debts had been paid, bequeathed the residue of his deposit account and otherwise disposed of the residue of his estate. Upjohn J. found as a matter of construction that the testator intended his debts to be paid out of the deposit account and not out of residue and was not affected in so finding by the fact that the debts were large enough to exhaust the deposit account so that the relief afforded to residue would not be complete. He found much difficulty in solving the problem of paras. 3 and 4 as posed by Maugham J. in *Re Kempthorne*, *supra*, but finally held that the account was primarily liable following *Re Littlewood*, *supra*. The learned judge considered himself supported in his view by *Re James*, *supra*, but did not advert to or develop the principle that it was necessary to find an intention to exonerate some other property of which the will attempts to dispose although such an argument was fully open on the facts of the case.

Conclusions

Exclusion of Statutory Order

The question whether or not the statutory order has or has not been varied by the will is, of course, purely a matter of construction. In some cases there can be little doubt that it has been varied whilst in others there can be little doubt that it has not: in the centre, as it were, the distinctions tend to be very fine. The difficulties are well expressed by Simonds J. in *Re Sanger*, *supra*, and it is thought that the best general guidance which exists is to be found in the judgment of Luxmoore L.J. in *Re Harland-Peck*, *supra* (*ante*, p. 269). It will often be found that a case can be classified as being on one side or other of the line there drawn.

Paragraphs 3 and 4 of the Schedule

A much more intractable problem is to be found in the existence of these paragraphs ranking as they do behind property undisposed of by will and property comprised in a residuary gift. The Court of Appeal in *Re Kempthorne*, *supra*, held that these paragraphs had no application where the property bequeathed or charged is

included in a residuary gift and that was sufficient to resolve the problem in that case. Whilst this finding has been eagerly accepted and applied it is a matter for regret that Lawrence L.J.'s above-quoted criticisms of *Re Lamb*, *supra*, have not been developed since they are based on an exact parity of reasoning. In *Re Sanger*, *supra*, Simonds J. mentioned those criticisms but regarded *Re Lamb*, *supra*, as established by the Court of Appeal in *Re Worthington*, *supra*.

Where the property bequeathed or charged is not included in a residuary gift some other method of resolving paras. 3 and 4 must be found. The only one which has so far been advanced is that developed in *Re James*, *supra*, and there is no doubt that it will be largely adopted. Nevertheless, it is not entirely convincing. In the first place it might well be thought that if a testator directs that his debts are to be paid out of fund X that, and that alone, indicates an intention that he does not want them to be paid out of fund Y or fund Z: that is, having found a provision for the payment of debts out of a particular fund it is not necessary to go further to find an intention to exonerate some other fund. In the second place it is difficult to see why one can find an intention to exonerate a fund if the testator affects to dispose of the fund and not if he is content to rely upon the laws of intestacy. Suppose A to leave his bank balance to X charged with the payment of his debts and to do no more being content that the rest and residue of his estate should be distributed according to the laws of intestacy. Suppose B to leave his bank balance to Y charged with the payment of his debts and to bequeath the residue of his estate to trustees upon trust for those persons who would be entitled to it under Part IV of the Administration of Estates Act, 1925. If the *Re James* test is applied X would take the bank balance free from the charge and Y would take it subject to the charge.

Legacies

The authorities bearing upon the application or non-application of the statutory order to legacies are indeed in a sorry state. The only occasion when the matter has been before the Court of Appeal was *Re Worthington*, *supra*: there it was decided the statutory order did apply to legacies. As suggested above, with respect, it is not clear whether the decision was upon section 33 or 34 and Lawrence L.J.'s argument based upon *Re Kempthorne*, *supra*, is of doubtful validity because *Re Kempthorne* did not decide that the new order applied to both debts and legacies but that it applied in that case to neither. However, *Re Worthington* was followed in *Re Sanger*, *supra*. In spite of this it has been held at first instance

that the statutory order does not apply to legacies in *Re Thompson, supra*, *Re Rowe, supra*, *Re Anstead, supra* and *Re Beaumont, supra*. *Re Worthington* was not cited in the first and third of these cases and was not mentioned in the judgments in the second and fourth. It is easy for textbook writers and commentators to say that the four cases which decided that legacies were primarily payable out of personalty are erroneous, cannot stand with *Re Worthington, supra*, and ought not to be followed; there is a temptation for them to say so if their own view happens to be that legacies ought to be paid indifferently out of realty and personalty. But such a statement is not much help to a practitioner who is advising the executor of a will which is on all fours with one of those cases. Is he to tell him to ignore the authority because it is in conflict with an earlier (and very unsatisfactory) decision of the Court of Appeal? On the present state of the decisions it is impossible to come to a final conclusion. For his own part the writer prefers the *Re Thompson* line of cases to *Re Worthington*, but that is of no help to the practitioner. It is to be regretted that in *Re Beaumont, supra*, the learned judge did not explain *Re Worthington* and it is to be hoped that that case will be fully discussed and explained (preferably by the Court of Appeal) in some future decision.

General

On the whole it is not unfair to say that the legislators of 1925 have not only left it in extreme doubt whether the statutory order does or does not apply to legacies but they have also vied with the learned jurists who propounded the doctrine of *renvoi* in constructing a logical cabinet of mirrors. In many cases the court can only strive to give effect to the obvious intentions of the testator so far as the statute permits that to be done. The draftsman who is constructing rather than construing a will should always keep his attention fixed upon the provisions and he would do well, in a case where the testator wishes to vary the statutory order, to do so by express words. Thus, if the testator wishes to charge debts, etc., upon a particular fund advantage might be taken of para. 8 (b) of the Schedule by expressly providing that " Property designated in para. 3 (or 4) of the Second Part of the First Schedule to the Administration of Estates Act, 1925, shall be applied for the payment of debts [etc.] before resort is had to property designated in paras. 1 and 2 thereof."

In this connection one wonders whether anyone has ever taken advantage of the provisions of section 34 (3) and provided *tout court* that the provisions of that subsection shall not apply at all.

There seems no reason why it should not be done, but if it is done it would be wise to provide a complete alternative scheme in the will, otherwise the inter-action of the scheme proposed and of the old pre-1926 law, which would presumably fill any gaps, might cause confusion even worse than that caused by the statutory order —if such be possible.

CONTRACTING OUT OF THE AGRICULTURAL HOLDINGS ACT, 1948

By J. F. Mackeson b.a.(Cantab.), Solicitor

The general rule is that any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament unless it can be shown that such agreement is in the circumstances of the particular case contrary to public policy: Halsbury, Vol. 7, p. 168, referring to *Griffiths* v. *Dudley* (1881) 9 Q.B.D. 357 and *Equitable Life Assurance, etc.* v. *Reed* [1914] A.C. 587.

The *Griffiths Case* arose out of a contract between workman and employer under which the workman agreed not to claim compensation for personal injuries under the Employers' Liability Act, 1880. In that case the workman was killed through an accident during his employment and it was held that his widow could not claim under the Act. It was argued that the contract was void as being against public policy, but this argument was not accepted by the Queen's Bench and Field J. said (at p. 363), "The county court judge held that the contract was against public policy. It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen, as a rule, were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy" and later, at p. 364, "In all the cases referred to in argument in which the legislature has intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule entire freedom of contract has been preserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what would be the consequences if the construction contended for by the plaintiff's counsel prevailed because, if injustice would result, it is unlikely the legislature intended that construction. I think that great injustice would result because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full

additional compensation when he was injured." He went on, " The strongest argument suggested in favour of the contention for the plaintiff is the desire of the legislature to protect workmen. Protection has been afforded them against late hours of work, unfenced machinery, the employment of children in manufactories, and in other instances. If it could be shown in the present case that large classes of workmen would be deprived of the protection which the legislature intended to give them by a decision that they could contract themselves out of the provisions of the Employers' Liability Act, a strong argument against that construction would be afforded. But that cannot be shown. I am of opinion, therefore, that this rule should be made absolute to enter judgment for the defendant."

The question arises whether it is possible in some way to contract out of the restrictions on operations of notices to quit contained in section 24 of the Agricultural Holdings Act, 1948. Section 24 (1) provides that where notice to quit an agricultural holding is given to the tenant and not later than one month from the giving of the notice to quit, the tenant serves on the landlord a counter notice in writing requiring that such subsection shall apply to the notice to quit, such notice to quit shall not operate unless the Minister of Agriculture consents to the operation thereof. Subsection (2) contains cases where the tenant or his personal representatives cannot serve a counter notice. Section 25 provides the machinery under which the Minister may grant consent. While he has a wide discretion, he cannot grant consent unless satisfied as to the existence of certain things. There is no provision in the Act expressly stating in words that the counter notice may be given notwithstanding any agreement to the contrary. Comparison may be made with section 23 which provides for a 12-months' notice to quit " Notwithstanding any provision to the contrary in the contract of tenancy." A similar phrase occurs in section 15 restricting penalties for breach of certain terms of the contract, and of course there is a general provision in section 65 that compensation shall be obtainable by a tenant or landlord under the Act and in accordance with its provisions " Notwithstanding any agreement to the contrary."

A strong, though negative, argument therefore arises from the fact that where the legislature clearly wishes that there should be no contracting out, it is so stated in the Act. Compare the words of Mr. Justice Field quoted above referring to " very express words " when it is desired that a person shall not be allowed to contract himself out of an Act of Parliament.

It is natural in considering questions of contracting out to turn to the position under the Rent Restrictions Acts. It is submitted however that the Rent Restrictions Acts are a special case. There

is no particular section preventing contracting out, but the courts have in effect held that the form of the legislation is such that it does not allow the courts to give effect to any contract attempting to contract out, although there is nothing to prevent parties so arranging their affairs that the Acts do not apply (see *Maclay* v. *Dixon* [1944] 1 All E.R. 22), and the position is somewhat similar to the position in Tax Cases.

The position under the Rent Acts was settled at a fairly early stage in their history (see the decision of the Court of Appeal in *Barton* v. *Fincham* [1921] 2 K.B. 291, especially the judgment of Bankes L.J. at page 297), " It appears to me that the legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the court. The language used is so clear and precise that there is in my opinion no room for cutting down or restricting the operation of the section. The legislature has definitely declared that the court shall exercise its jurisdiction only in the instances specified in the section [*i.e.*, section 5 of the 1920 Act] and in no others," and on page 296 " In my opinion Section 5 is an instance of a case where the legislature has in clear and unmistakable language restricted the jurisdiction of the court, and where no agreement between parties can give the court a jurisdiction which the legislature has said it is not to exercise." Section 5 reads " No order or judgment for the recovery of possession, etc., shall be made or given unless " . . . The legislature, of course, might have enacted that a landlord should not be entitled to possession notwithstanding any agreement in a contract of tenancy to the contrary unless he should satisfy the court that, etc., but the legislature did not choose to legislate in this way and as Bankes L.J. said, put the fetter on the court rather than on the landlord.

It becomes, therefore, in these Rent Act cases a matter of the jurisdiction of the court and the court is prohibited from making an order for possession. Further, as is well known, when cases have come before the courts where a tenant has entered into a contract not to plead the Rent Acts or argues that the landlord is estopped from pleading them, nevertheless the courts take the view that they have no jurisdiction to give effect to any such agreement in view of the prohibitive nature of the statute. It seems generally to be agreed that contracting out of the Rent Acts would be against public policy (*cf. Griffiths* v. *Davies* [1943] K.B. 618, especially the judgment of du Parcq L.J. at page 622). On the other hand, the case of *Maclay* v. *Dixon*, *supra*, does show that there is nothing objectionable in parties so arranging their affairs that the Rent Acts do not apply.

It is submitted, therefore, that the Rent Acts are a peculiar case which depends on the particular wording of section 5 of the 1920 Rent Act.

The position is the same as if the legislature had in terms provided for no contracting out. Some argument therefore can be derived from the fact that the form of section 24 of the Agricultural Holdings Act, 1948, is different from the form of section 5 of the 1920 Rent Act. Section 24 does not say, as it might, that no order or judgment for the recovery of possession of an agricultural holding shall be made unless . . . —on the contrary it says that where notice to quit is given and the tenant serves a counter notice, the notice to quit shall not have effect unless the Minister consents, etc.

A vital distinction is the provision for a counter notice which it is incumbent on the tenant to serve if he wants to qualify for protection and no court in the land can extend the time for him to give such counter notice. He himself, therefore, has to take the step in order to place a fetter on the landlord. There is, of course, also a fetter on the courts giving possession if the tenant serves a counter notice and the Minister does not give consent, but the fetter on the court is dependent on the tenant's first placing the fetter on the landlord.

Under the principle that a citizen can renounce by contract statutory benefits unless it is against public policy, there is no reason why a tenant should not renounce the security of tenure given by the Act. Negative evidence of this is given by the fact that it is usual for the legislature to use, as Field J. said in *Griffiths' Case*, " very express words." Such very express words are used in other sections of the Agricultural Holdings Act, 1948, but are not used in either of sections 24 and 25.

There is, however, one other hurdle to get over, *viz.*, the hurdle of public policy. Times have changed since the position in *Griffiths' Case*, where the judges evidently felt themselves able to ignore the economic positions of employer and employee. The argument then was the simple one that the position of the workman as regards the employer is always the same and the condition of the labour market, *i.e.*, full employment or various degrees of unemployment, is not even hinted at. It is submitted that it has been the tendency of the Supreme Court and the House of Lords over the last 20 or 30 years to pay more heed to the social and economic background. Besides, public policy does not stand still. This, of course, would make all the difference in applying the remarks as to reasonable bargains of Field J. to the market for farms-to-let today. Even in Field J.'s time it surely must have been clear that in times of unemployment

the workman might have been induced to accept a contract under which he contracted himself out of the Employers' Liability Act at the same wage as he would have obtained without such contracting out in times of greater employment. Today, with the great shortage of farms to let, it may be argued that there is such competition amongst the tenant farmers that they would be willing to accept adverse conditions in order to obtain a farm. (Generally speaking, of course, the tendency is to pay high rents rather than to accept other types of onerous contracts.) It is thought that today the courts would hardly accept in full Mr. Justice Field's arguments.

However, even so, it is not considered that the courts would hold an attempt to contract out of section 24 as void because against public policy.

There is a negative argument on this point from the fact that there is no direct fetter on contracting out in the Agricultural Holdings Act and that in considering whether contracting out is against public policy one must consider the form and content of the Act itself. The fact that the Act does not in terms forbid, is an argument from the point of view of public policy that it intended to allow. It may also be pointed out that by way of contrast Part 1 of the Agriculture Act, 1947, s. 1, has a very clear statement of policy in regard to guaranteed prices and assured markets, whereas there is nothing of a similar nature in the 1947 or 1948 Acts either in a section of the Act or by way of preamble to the sections on the relation between landlord and tenant. It is true that the intention of the legislature is often talked about as being security with efficiency, but there is no section in the Acts which definitely states this, although it may be argued that it is a reasonable deduction from the machinery of the Acts. It is clearly in the public interest that there should be efficient tenants, and this helps the public policy argument against contracting out. On the other hand it can be argued that the Act leaves it largely to the initiative of the individual landlord or tenant, at any rate as regards using the machinery of sections 24 and 25, to protect the good tenant and get rid of the bad. It is to be noted that the policy of the Act is partly to leave this matter to controlled private initiative (sections 24 and 25) and partly to put the duty on public bodies (supervision orders, etc., under 1947 Act). This analysis appears to favour the argument that public policy does not require contracting out to be illegal.

It is realised therefore that a quite forceful argument can be raised on the public policy point, but it is considered that it does not quite win the day so as to prevent contracting out.

The following possible methods of contracting out of the Act or avoiding its incidents may be listed :—

(1) A tenancy at no rent or merely in return for tenant's covenants;
(2) A letting of pasture for less than a year under section 2 or the consent of the Minister under that section;
(3) The giving of a power of attorney by the tenant to the landlord so that the landlord may on the tenant's behalf serve a tenant's notice to quit;
(4) The machinery of the subtenancy, *i.e.*, the landlord rents to a nominee of his who sublets to the real tenant;
(5) A lease or contract of tenancy containing a covenant or agreement by the tenant not to serve a counter notice under section 24.

The first three may be summarily dismissed. It is submitted that, provided the other attributes of an agricultural holding are present in accordance with the definition in the 1948 Act, the mere fact of there being no rent is immaterial. After all, one may have a tenancy from year to year at no rent, just the same as one may have a tenancy at will at a rent; and the tenancy from year to year is as a matter of historical derivation a development of the tenancy at will (see Hill and Redman, Landlord & Tenant, p. 22).

The use of section 2 of the Act is of only limited value, and unless the Minister's consent is obtained is only of use for pasture.

As regards No. (3), the power of attorney, it is felt that this is too technical, and there are difficulties, too, about making the power of attorney irrevocable for a sufficient period. Also the power of attorney may itself be void as preventing a tenant from making a claim to compensation for disturbance under the Act (*Re Disraeli* [1939] Ch. 382 and *Coates* v. *Diment* [1951] 1 All E.R. 890).

It is submitted that No. (4), the creation of a subtenancy, is the best method at the moment owing to the ineffective way in which the Minister has protected the subtenant, in The Agriculture (Control of Notice to Quit) Regulations. If an intermediate tenant receives notice to quit from the landlord and in turn gives notice to quit to the subtenant, stating in such latter notice that he has received notice to quit from the landlord, then the subtenant is denied by the regulations the right to serve a counter notice. If this method is employed, it is advisable that the subtenant should fully realise than an arrangement is being made which will prevent his having any protection under sections 24 and 25 of the Act (see the observations of Scott L.J. in *Maclay* v. *Dixon*, *supra*, as to bona fides in such cases). It is thought however, especially if this method becomes current, the Minister will be moved to alter the rules.

With regard to No. (5) it is felt that the covenant or agreement not to serve a counter notice may well be of limited value. It is

considered however that if despite the agreement or covenant the tenant does serve a counter notice, the County Committees and the Tribunal and any Court of Law would have to proceed without regard to the covenant by the tenant, to work the machinery of the Act with regard to giving consent, etc. It is possible that a landlord might get an injunction to restrain a tenant from serving a counter notice (see Halsbury generally on Injunctions, Vol. 18, from which the following short notes are taken) : A denial of intention by the defendant is not a ground for refusing an injunction (p. 16). The courts will not grant an injunction if it would be oppressive, harsh or illegal or against public policy (p. 53). However, injunctions have apparently been given to prevent the entering up of a judgment contrary to an agreement not to, and also against breach of an agreement not to apply to Parliament (p. 59). On the other hand, no injunction will apparently be given except in the case of fraud to restrain the use of some special Tribunal (p. 87).

The practical difficulty is that there is very little time in which to ascertain the tenant's intentions and to apply for an injunction. The application to the court would probably have to be made at the same time as the notice to quit is served. It is thought that once the counter notice is actually served by the tenant then in view of the wording of section 24 (1) the courts would not issue an injunction to restrain further proceedings before the Committee or Tribunal.

This means of course that the covenant or agreement not to serve a counter notice is rather an ineffective weapon if it is absolutely essential to be able to get vacant possession. It would appear that unless an injunction is obtained as above, preventing the serving of a counter notice, the only remedy left to the landlord if the tenant does serve a counter notice and consent is refused will be an action in damages for breach of contract. The difficulty in such an action will be to establish what the damages are. If, for instance, the landlord has not been through the procedure of applying for the Minister's consent, the tenant might possibly be able to argue that the damages should be reduced on the ground that they were too remote and did not directly flow from the breach. Presumably, the landlord could argue that the measure of damages should be the difference in the value of the farm with the tenant in it and the value with vacant possession, but, as stated above, it would appear that the landlord would have to go through the usual procedure of applying for the Minister's consent, otherwise he would be met by the above argument in reduction of damages. Again, if in the future the difference between vacant possession value and value subject to a tenancy is reduced or disappears, then any claim which the

landlord will be able to make for breach may very well become negligible.

The writer has seen a farm agreement drafted since the 1948 Act in which a very bold attempt was made to contract out of sections 24 and 25 of the Act. The tenancy agreement declared quite baldly "Sections 24 and 25 of the Act shall not apply to this agreement." The machinery of section 24 is closely linked in certain circumstances to section 34 because it provides cases where the landlord is not liable to pay compensation for disturbance to a tenant. If the courts held that the exclusion was legal, then they would have to decide how this exclusion affected the position under section 34. For this and other reasons it is inadvisable to use such drastic surgery, and it is the writer's view that the courts would hold such exclusion as of no effect. On exactly what grounds the courts would come to this conclusion it is perhaps difficult to say, but the courts might perhaps hold that the sections do form substantive law and that, while a tenant or landlord may waive rights arising under such law, it is not possible for individuals to alter the law of the land in this drastic way. It is as if an attempt were made in a commercial document to exclude the Statute of Frauds or in a conveyancing document to exclude various sections of the Law of Property Act.

Until there is an authoritative decision of the courts it is therefore advisable in preparing tenancy agreements to make clear to the party for whom one is acting that any attempt to contract out of the Acts may well be challenged and give rise to litigation. There may well, however, be exceptional cases where methods (4) or (5) may be worth trying. In conclusion, it should not be overlooked that an agreement to surrender may sometimes be of use where the tenancy is only a short one and is to end on a specified date, and that in special circumstances (such as where a landlord farming the land himself desires to go abroad for a limited period) there should be stated in the tenancy agreement the purpose for which the interest of the landlord was held immediately before the creation of the tenancy. This will enable a landlord to argue "greater hardship" under section 25 (1) (c) of the 1948 Act in cases where he would not be able to do so if he became landlord on or after August 6, 1947.

TENANTS IN POSSESSION AND MORTGAGEES

By E. H. Bodkin, Barrister-at-Law

The implications of the recent cases of *Coventry Permanent Economic Building Society* v. *Jones and Others* [1951] 1 All E.R. 901 and *Universal Permanent Building Society* v. *Cooke and Others* [1951] 2 All E.R. 893, as regards the protection by registration of the interests of tenants against ejectment by a mortgagee were considered in an article entitled " Tenants in Possession and Third Parties " in Vol. 15 of The Conveyancer at p. 381. Apart from the question against whom the tenant can effectively register a land charge in respect of his agreement, it is a simple matter to ensure that it will be valid as against a mortgagee who has advanced his money on the occasion of the purchase of the freehold.

The protection of the mortgagee against the undisclosed creation of tenancies which may confer the protection of the Rent Acts on the tenant is not so simple, nor is the adequacy of the ordinary methods of protection so complete. It may of course happen in the case of a mortgage made by the legal owner that the mortgagor may in fraud of the mortgagee grant a lease or tenancy of the mortgaged dwelling-house, or a separate part thereof, for a term to commence after the date of the mortgage, which will fall within the Rent Restrictions Acts and will prevent his obtaining a security on a house with the benefit of vacant possession, notwithstanding the mortgagor has been in occupation himself up to the date of completion. This, however, is a risk which has always been faced.

Leases which are valid at law and create terms under which the tenant is given possession before completion will generally be disclosed by inspection or inquiry. The mortgagee will know, or make it his business to discover, whether the mortgagor is in sole occupation and will have a right to require the mortgagor to give him permission to see the property for that purpose. Ordinary tenancy agreements will be void against him if not registered, even apparently if the tenants have been let into possession, and in any case they will be found in occupation. The peculiar danger which arises where the loan is made to enable the mortgagor to purchase the property is that, although the mortgagor's vendor is assumed to be in possession, a tenancy may be granted by the mortgagor which by estoppel will become binding on the mortgagee without registration and entitle the tenant to the protection of the Rent

Restrictions Acts. Though the mortgagee will presumably obtain a surveyor's report on the property, he may well not consider it incumbent on him to make an inspection himself and inquire of the persons in possession as to their rights, or at any rate to repeat such inspection and inquiry immediately prior to completion. It is, however, of great importance for him to do so and he should if necessary require the mortgagor to obtain an authority from his vendor for that purpose.

It is proposed to consider how far the usual searches and inquiries will avail as regards tenancies by estoppel.

Inspection and Inquiry

Inspection and inquiry should give the mortgagee notice of most tenancies. But under modern conditions it may happen that, even if he goes over the whole house, he may not discover that part is let on a tenancy and the occupier is not merely a paying guest or lodger. It is unlikely nowadays that he will find the occupier of separate rooms at home and the mortgagor may put him off by misrepresenting the facts. The principle of *Hunt* v. *Luck* [1902] 1 Ch. 428, which is now applied also to registered land, lays a heavy burden on mortgagees as regards constructive notice; and as regards estoppel it is the fact of the existence of the tenancy that is important. Inspection and inquiry should also, subject to the same practical difficulties, disclose the existence of any rights which a tenant may claim to possess by reason of possession and payment and acceptance of rent independently of an agreement which he should have, but has not, registered, and which is consequently void as against the mortgagee. It was suggested in the article referred to that such rights might be binding on a mortgagee with constructive notice of them. This appears, however, to be contrary to the decision in the *Coventry Case*. There the tenancy was to take effect on the tenant entering into possession on completion of the mortgagor's purchase, and on so doing he was given a rent book. It was argued that the plaintiff mortgagees, having constructive notice of his rights, were bound by them, but it was held that his only rights were equitable rights depending on the agreement, and as this was void against the plaintiffs for non-registration they were entitled to possession.

In one case, however—which as appears from recent cases is not a remote one—inspection and inquiry will not avail the mortgagee. The mortgagor may have purported to grant a lease to commence from a date *after* completion, and under which therefore the tenant will not be found in occupation. This is in fact a not unreasonable arrangement for an ignorant, but not necessarily

dishonest, mortgagor to make; and if he does, the principle of "feeding the estoppel" will apply. Such a lease, assuming the lessor had the legal estate to support it, would create a legal term of years as from the date of its execution, *interesse termini* being abolished. A lease for a term to commence at a future date now operates like an appointment to uses before 1926 or a bargain and sale under the old law. See Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., p. 497. Consequently estoppel will apply. This risk corresponds to the possibility of the grant of a similar lease by a mortgagor who already has the legal estate.

Search

When the mortgagor has only an equitable estate under his contract of purchase, all purported leases will, apart from estoppel, require registration as land charges. Having no estate to support the demise, he can only make a contract or promise to give one. See the *Universal Case*, *supra*, at p. 897.

Estoppel applies generally, however, to all such purported leases when the landlord obtains an unrestricted legal estate and renders registration unnecessary to affect the mortgagee; but it does not arise in relation to agreements for leases or tenancies even if no further document is in fact intended to be executed. Such agreements do not purport to create interests at law and always require to be registered as land charges.

When the transactions of purchase and mortgage are held to be one, as in the *Coventry Case*, search will be a complete protection against agreements for leases or tenancies, including purported leases. There is a possible set of circumstances—rare it may be conceded—where inspection and not search may conceivably be the appropriate precaution against agreements. The tenant may have been let into possession under an unregistered agreement or tenancy and subsequently given notice to quit by the mortgagor prior to completion of the mortgage. Here no estoppel will of course arise, but it may be suggested that he has become a statutory tenant of the mortgagor and also of the mortgagee, the latter being a landlord or person deriving title under the landlord within section 12 (1) of the Rent and Mortgage Restrictions Act, 1920. The Court of Appeal in *Dudley and District Benefit Building Society* v. *Emerson* [1949] 2 All E.R. 252; [1949] Ch. 707; left it open whether a purely statutory tenant of a mortgagor who had let the property to him under his common law power of leasing subsequently to the mortgage could claim protection against a mortgagee who was asserting his paramount right. (It is

submitted that he could not, as a statutory tenancy is not good against all the world, but the doubt remains.)

In the case suggested the tenant's position might be said to be analogous, the agreement being void against the mortgagee for non-registration, just as the tenancy by the mortgagor under the common law power is void against him.

It was, however, decided in *Brake* v. *Ward* (1922) 11 L.J.C.C. 74, that a purchaser who is let into possession by the vendor as tenant at will cannot, except as against himself, create any greater interest than he himself has, and that a tenant to whom the purchaser had let the property on a weekly tenancy was a mere trespasser and could not claim protection as against the vendor seeking possession on failure to pay the instalments of the purchase money.

It would seem therefore that, at any rate where the purchaser is expressly let into possession as tenant at will, his tenant would not be protected as against the mortgagee apart from estoppel or registration of a land charge. But if the mortgagor has power to grant a tenancy, a tenant at will is within the Rent Acts if he pays rent; *secus*, if he does not: see *Alliance Building Society* v. *Varma* [1949] 2 All E.R. 261, where an order for possession by the mortgagee against the tenant was made without the point being argued.

It may be noted here that when the mortgagor is let into possession as tenant at will or under the ordinary provision in the contract estoppel may not arise in regard to a short periodic tenancy : see the *Universal Case*, at p. 897.

Registered Land

Where the title to the land is registered under the Land Registration Acts the validity of a tenancy against the mortgagee generally depends, where there is no estoppel, on constructive notice on the principle of *Hunt* v. *Luck* [1902] 1 Ch. 428.

Section 70 of the Land Registration Act, 1925, provides that "All registered land shall, unless under this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may for the time being be subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act (that is to say):— . . . (g) the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such persons, and the rights are not disclosed; . . . (k) leases for any term or interest not exceeding 21 years granted at a rent without taking a fine."

By section 3 (*x*) "Lease" is defined as including any tenancy or agreement for a lease or tenancy. Leases may be protected by registration of a notice under section 48 and Land Registration Rules, 1925, r. 186.

It might have been thought that the definition of "lease" would apply to section 70 and that an agreement for a lease for less than 21 years where no premium is taken would depend in all cases on notice as an overriding interest. This view appears to be taken by the learned author of Emmet on Title, 13th ed., p. 1268. In The Conveyancer, Vol. 16, at p. 38, however, the opinion is expressed that an agreement for a lease which requires to be by deed is a minor interest requiring protection by notice on the register to affect a purchaser; and that he would not be bound by notice of the tenant's rights even if the latter were in actual occupation (see also *ante*, pp. 172–4).

It is at any rate clear that a purported lease for less than 21 years to commence after completion which creates a legal term by estoppel will bind the mortgagee as a legal overriding interest. But if it remains contractual it will not do so apart from notice, or possibly in some cases, entry of a notice on the register.

Provisions in the Mortgage Deed

It will be seen from the above considerations that where estoppel may operate the mortgagee cannot obtain complete protection, either as regards registered or unregistered land. The risk to which all mortgagees are subject of having a tenant put in after completion to whom the property has been previously let is repeated here in a different form. Further there may, as we have seen, be difficulties in finding who is in occupation. To attempt to bring the mortgage within the *Coventry Case* (even if it be good law) is not a satisfactory expedient. Consequently, it is suggested that the mortgagee should, even if he has inspected the property, require the insertion in the mortgage deed of a covenant by the mortgagor that he has not granted, or attempted or agreed to grant, any tenancies other than those disclosed, with a proviso that if the covenant is broken, the mortgagee can exercise his power of sale. There appears to be nothing to prevent such a covenant being added to the prescribed form of registered charge. (For a precedent of such a clause, see Form 10, p. 547.)

The mortgagor's common law powers of leasing should, of course, in any case be excluded or made exercisable only with the mortgagee's consent in order to preclude his attempting to put in a tenant subsequently to the mortgage. This has the added advantage that it prevents any tenancy granted prior to the mortgage

from being turned by estoppel into a legal tenancy under the power to lease in circumstances where the *Coventry Case* applies, as might otherwise occur.

Where the mortgagee's exercise of his rights is restricted by the provisions of the Rent Restriction Acts in relation to mortgages, as they will usually be if the property is let, he will be precluded from taking possession as against a tenant of the mortgagor under a tenancy created after, or it seems, before, the mortgage, except in the circumstances mentioned in the Acts. This was held to be the case under the 1915 Act in the Irish decision of *Martin* v. *Watson and Egan* [1919] 2 Ir.R. 332, which related to a lease granted subsequently to the mortgage. This case, though it was not accepted in the *Dudley Case* as an authority on the meaning of " landlord " in the 1920 Act, was not dissented from as an authority on the particular facts. In the *Dudley Case* there had been a breach of a provision in the mortgage deed, which removed the statutory bar, and consequently the point did not arise for decision.

Further if the mortgage, as is sometimes the case, itself precludes the mortgagee from taking possession until after default, he cannot do so against the mortgagor, or it seems, claim ejectment against his tenant. Such a provision should, therefore, be carefully considered in drafting a mortgage of a dwelling-house.

The ordinary provision against calling in the money for a fixed term does not, of course, prejudice the mortgagee's rights against a tenant of the mortgagor, as it leaves it open to him to exercise his right to take possession immediately after completion.

Covenants for Title

It is not proposed to consider in detail the other possible remedies against a mortgagor who has introduced a protected tenant without the mortgagee's knowledge.

It is, however, to be observed that a lease or tenancy which becomes by estoppel a legal term will be a breach of the mortgagor's covenant for right to convey. Any outstanding estate, interest or claim created by the mortgagor falls within the scope of this covenant, unless the mortgage is made expressly subject to it. (See Williams on Vendor and Purchaser, 4th ed., p. 1078; *Butler* v. *Mountview Estates, Ltd.* [1951] 1 All E.R. 69.) A lease or tenancy is within the covenant, whether it creates a legal term of years absolute or merely an equitable term.

A breach of the covenant would not, however, cause the statutory power of sale to become exercisable under section 103 (iii) of the Law of Property Act, 1925, and an express provision, as suggested above, would be necessary for this purpose.

CORRESPONDENCE

Dear Sir,

In looking at the May/June edition of the Conveyancer and Property Lawyer I was interested in Precedent No. 7, Assignment of Leasehold Shop premises, the purchase price being payable by instalments.

I have acted for vendors in connection with the sale to sitting tenants of small houses, the sitting tenants paying a small deposit and the balance of the purchase money payable by instalments. The transaction has been carried out by means of a Conveyance to the purchaser and a mortgage to the vendor, the principal and interest being payable by weekly instalments.

On seeing the Precedent I am wondering whether it could be adapted for such a case and a Conveyance be prepared providing for the payment of the purchase money by instalments thus saving the necessity of preparing a Mortgage Deed.

I shall be glad to have your views as to whether you think this would be suitable, and if so, perhaps you will let me know what remedy you consider the vendor would have if the purchaser failed to pay the instalments, in view of the fact that he would buy as a sitting tenant and would be in possession.

Yours faithfully,

C. D. Burgess.

Rotherham, July 1, 1952.

[This form could be adapted to the case of a purchase of a dwelling-house by the sitting tenant. The drawback of the form is that while it gives express effect to the vendor's lien for unpaid purchase money, the vendor remains only an equitable mortgagee and has only the rights of such a mortgagee. In the ordinary case where a substantial sum is left on mortgage the more orthodox course of taking a legal mortgage is the better.—Ed.]

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Power of appointment—rule in Whitby v. *Mitchell.*—In *Re Leigh's Marriage Settlement* [1952] 1 T.L.R. 1463, Vaisey J. had to decide whether, on the exercise after 1925 of a power of appointment given in a pre-1925 settlement, a direction in the settlement that the power should not be exercised so as to infringe the rule in *Whitby* v. *Mitchell* was binding on the appointor. The exercise of the power by deed in 1946 clearly infringed the rule and the question was whether the exercise was valid.

Section 161 (1) of the Law of Property Act, 1925, abolishes the rule in *Whitby* v. *Mitchell,* and it is provided by subsection (2) of that section that the " section only applies to limitations or trusts created by an instrument coming into operation after the commencement " of the Act. The learned judge referred to *Re Batty* [1952] 1 T.L.R. 412 (see note, *ante,* p. 130) and emphasised his reason for distinguishing that case from (inter alia) *Re Dickinson's Settlement* [1939] Ch. 27. (These two cases concerned a similar problem to the present one, arising under section 32 and section 31 respectively of the Trustee Act, 1925.) Vaisey J. felt that this case was a matter of some difficulty and capable of argument both ways, but on the whole he thought that the better view was that the instrument by which the limitations in question were created was the deed of 1946.

Finally, the learned judge emphasised that in this particular case the rule in *Whitby* v. *Mitchell* was in his opinion clearly mentioned only as a warning to the draftsman, and it was intended to prohibit absolutely a limitation outside the rule so as to make any such appointment *ultra vires* the settlement.

The deed of 1946 was therefore valid.

Easement — implied grant — way of necessity. — Barry v. *Hasseldine* [1952] 2 T.L.R. 92, was on a point surprisingly not yet decided, namely, whether on the sale of land situated away from the highway, but not wholly surrounded by land retained by the grantor, there is implied a way of necessity over the retained land to the highway in favour of the grantee.

The land in question had been bought from the defendant by the plaintiff's predecessor in title. At the time of the grant access to the plaintiff's land from the highway was obtained by a permissive right from land adjoining the plaintiff's vested in third parties. This right had since been determined.

Gale on Easements, 12th ed., at pp. 158, 159, expresses doubts as to whether there is implied a way of necessity in favour of the grantee when the granted land partly adjoins the land of strangers, but Danckwerts J. held that as a matter of common sense there was such an implied grant and that the permissive rights given by strangers owning adjoining land were quite irrelevant as they might well be determined on the day after the grant.

The learned judge held on the evidence that there had been no abandonment of the plaintiff's legal right and that he was therefore entitled to access over the defendant's land from the highway along a route chosen by the defendant.

Estate agent's commission—"Signed a legally binding contract."—In *Midgley Estates, Ltd.* v. *Hand* [1952] 1 T.L.R. 1452, Jenkins L.J. said, speaking of estate agents contracts, "an agency contract of this sort, just like any other contract, must be construed according to its terms. One has to look at the particular contract and see whether, according to its terms construed in accordance with the ordinary principles of construction, the event has happened in which the commission is expressed to be payable.

"So far as any general principle is deducible from the authorities, their effect may, I think, be thus summarised: the question depends on the construction of each particular contract, but prima facie the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. . . . That is the broad general principle in the light of which the question of construction should be approached; but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or another turns out to be abortive."

In the present case therefore where the commission was to be paid "as soon as our purchaser shall have signed a legally binding contract," and after contract but before completion, the sale went off as the purchaser could not raise the necessary purchase money, the court without difficulty found that the meaning was reasonably plain and held that the agents were entitled to their commission.

Limitation of action—Rent and Mortgage Interest Restrictions Act, 1939.—In *Moses* v. *Lovegrove* [1952] 1 T.L.R. 1324, the Court of Appeal rejected the suggestion that the final test of adverse possession is whether the owner of the property has an unqualified right to sue for possession.

In 1938 the defendant was an oral weekly tenant of a dwelling-house of the plaintiff. After May of that year the defendant ceased to pay rent and had since made no other acknowledgment of the plaintiff's title. The premises, which had been decontrolled in 1935, became controlled again in 1939, under the Rent Act of that year.

The Court of Appeal upheld the finding of the county court judge that the plaintiff's title was extinguished under section 16 and section 9 (3) of the Limitation Act, 1939, by 12 years' adverse possession from the time when the right of action accrued; *i.e.*, 12 years from the end of one week following the last payment of rent. Birkett L.J. said, "the provisions of the Rent Act, 1939, are in truth irrelevant to and outside this case."

The court emphasised that they were not deciding what the position would be had the right of action arisen when the premises were within the Rent Acts, for in this case it was admitted that the right had arisen before the premises became controlled. Romer L.J. pointed out that it was possible to look at the question from the point of view of the occupier as well as the owner, and to say that the occupier's possession was adverse if it was not derived from the owner, as, for example, by permission or grant. The Rent Acts certainly conferred no such derivative title on one whose possession was already adverse.

Deserted wife in matrimonial home — contractual licensee. — *Bendall* v. *McWhirter* (*supra*, p. 236) was followed by Jones J. in *Ferris* v. *Weaven* [1952] 2 All E.R. 233, where the husband had come to an arrangement with his deserted wife that she should remain in the matrimonial home. He paid the rates and the mortgage instalments as they fell due, but otherwise he made her no allowance. This position continued for 10 years, and then the husband, without the wife's knowledge, sold the house to the plaintiff, who was his brother-in-law, for £30. The purchase price was never paid and the husband continued to pay the rates, etc. The plaintiff then sued for possession, but admitted that he had bought the house to oblige the husband and in order to get the wife out.

Jones J. held that the wife was a licensee with a contractual right to remain, and that the plaintiff having bought with notice of her equity, was bound by it.

Trust for children—child legitimated at common law—position not affected by statute—Legitimacy Act, 1926, *s.* 8 (1).—In *Re Hurll* [1952] 2 T.L.R. 85, a child whose father had an Italian domicile had been born in Italy out of wedlock. The parents subsequently married and by Italian law, which recognises legitimation *per subsequens matrimonium*, the child was legitimated. Before 1926 at common law he would also have been legitimated, and entitled to share with afterborn children in an interest under his English grandfather's will (*Re Grey's Trusts* [1892] 3 Ch. 88) even though he was born after his grandfather's death.

The question then arose as to whether the Legitimacy Act altered his position. By section 3 of that Act it is provided that persons legitimated under the Act can only take the benefit of dispositions coming into operation after the date of legitimation, and therefore in the present case if the child was legitimated under the Act and not at common law he could not take under the will. Under the Act

the child could have been legitimated if at all, only by section 8, but Harman J. held that section 8 only applied to those who had not been legitimated before (*viz.*, persons whose fathers were domiciled at the date of marriage but not at the date of the birth in a country which recognised legitimation *per subsequens matrimonium*). The learned judge therefore held that the child was still legitimated at common law and was to be regarded as a child of the marriage of his parents, and entitled as such to an interest under his grandfather's will.

Accumulations—general charitable intent.—In *Re Bradwell's Will Trusts* [1952] 2 T.L.R. 96 (see Notes on Charity Cases), Roxburgh J. followed *Martin* v. *Margham* (1844) 14 Sim. 230, and held that where a will contains gifts which show a general charitable intention and there is a direction to accumulate the income for a period outside that allowed by section 164, Law of Property Act, 1925, the direction to accumulate is simply an administrative direction, though void, and the residuary legatees are excluded. This is because where there is a general charitable intention any surplus income after the statutory accumulations period is over will be applied *cy-prés* and will not go to the next-of-kin. (See *per* Lawrence L.J. in *Re Monk* [1927] 2 Ch. 197, at p. 215.)

Donatio mortis causa—key.—In *Re Lillingston, decd.* [1952] 1 T.L.R. 1622, the deceased had, as Wynn-Parry J. decided, made a valid *donatio mortis causa* of some jewellery, and the only question was whether there had been sufficient delivery of it. The deceased had given the donee a key to a trunk containing some of the jewellery and informed the donee that in the trunk was the key to a safe she rented at H., Ltd., containing more jewellery, and in which safe was yet another key to a safe she rented at N., Ltd., which contained further jewellery. The deceased made it clear that she intended the donee to have all the jewellery. Both H., Ltd. and N., Ltd. gave deputies of hirers access to rented safes only provided the deputy had the key and the renter's written signed authority, and other requisites. The donee in the present case had no written authority.

Wynn-Parry J. held that there had been a sufficient delivery of all the jewellery and referred to *Re Wasserburg* [1915] 1 Ch. 195. He said, "In my view it does not matter in how many boxes the subject of a gift may be contained or that each, except the last, contains a key which opens the next, so long as the scope of the gift is made clear."

The absence of the deceased's written authority in the present case was immaterial. The learned judge referred to the words of Luxmoore L.J. in *Delgoffe* v. *Fader* [1939] 1 Ch. 922 at p. 927. Where the subject-matter of a valid *donatio mortis causa* is not completely vested, the donee can, under an implied trust, call upon the personal representative to vest it in him.

Market stalls—charges not regulated by custom, charter or statute. —In *Att.-Gen.* v. *Colchester Corporation* [1952] 2 T.L.R. 49, Danckwerts J. had to decide "an extremely interesting question on which there is very little definite authority—namely, whether sums required by an owner of a market to be paid for the exclusive occupation of stalls in the market, by virtue of his ownership of the soil on which the market is held, must be limited to reasonable amounts" under the Statute of Westminster I, 1285.

After discussing many authorities at length, he drew a distinction between those markets where stallages are paid because by statute, charter or custom the trader must pay the prescribed toll in order to sell in the market at all, and those markets, like the one under consideration, where the trader is under no obligation to incur the charges except for his greater convenience, as by taking a stall by voluntary agreement with the owner of the soil. (See *Rex* v. *Burdett* (1867) 1 Ld.Raym. 148.)

In the present case, there was no allegation that there was no space to sell goods as in the old days without using a stall. The payments for stallage were made at previously agreed rates by voluntary agreement, and such voluntary bargains could not be attacked on the ground that the sums paid were unreasonable.

Fiduciary relationship—solicitor and client.—McMaster v. *Byrne* [1952] 1 All E.R. 1362, was a Canadian case before the Judicial Committee. The facts, which were very complicated, were in outline as follows: the respondent had acted as solicitor to M. and P. in the formation of a company, S.P., Ltd. In 1939 M. resigned his directorship of S.P., Ltd., and formed a new business which, with the respondent's assistance, he later formed into a second company, M.P., Ltd. M. appointed the respondent his executor and gave the respondent the custody of his will. In 1946, M., who had made frequent efforts to realise his interest in S.P., Ltd., granted an option to P. to purchase his, M.'s, shares in that company. The respondent was told by P. in 1947 that negotiations were in progress for the sale of a controlling interest in S.P., Ltd. to an English company, and at the same time the respondent obtained an assignment from P. of P.'s option on M.'s shares. The respondent then obtained a fresh option on the shares from M., without apparently disclosing the negotiations with the English company. The respondent then exercised his option, the sale of the controlling interest to the English company was completed, and the respondent made a profit of $97,000. M. died in 1948, having appointed his sons executors in the respondent's place, and they then sought from the respondent an account of the profit.

The Judicial Committee approved and applied the dictum of Parker J. in *Allison* v. *Clayhills* (1907) 97 L.T. Rep. at p. 712. "It is impossible," said Lord Cohen in the present case, "to define precisely what circumstances will justify the inference that the confidential relationship" (of solicitor and client) "continues," but he found that the relationship must be deemed to have continued in the present case until the date on which M. gave the respondent a fresh option, although on that date the respondent was not acting as M.'s

solicitor. The Judicial Committee were doubtful as to whether the respondent had discharged the onus of showing that he had made full disclosure of all that would influence the mind of a reasonable man, and therefore a new trial was ordered.

Power of appointment a "provision" for donee.—"I take the view that when a parent has a power of appointment among his issue, it is a provision in favour of the parent and can properly be said to have been made for his benefit . . . A father or mother with such a power of control over his or her children . . . is in a much better position than if he or she has no such controlling power." The above are the words of Vaisey J. in *Re Spensley's Will Trusts* [1952] 1 T.L.R. 1435, at p. 1441. (See Notes on Charity and Will Cases.) With some doubts, the learned judge held for the reasons given above and following *Re Brough* (1888) 38 Ch.D. 456, that a revocation by codicil of "all provisions" for the testator's niece in a certain will, not only revoked the niece's life interest but also a power of appointment given to her and exercisable among her issue. In *Re Brough* (*supra*) the facts were very similar, the codicil revoked all devises and bequests "in favour of" the person in question.

As Vaisey J. observed, this is a strange point and *Re Brough* may well be overruled in a higher court.

Right of entry—Public Health Act, 1936, *s.* 287 (1) *proviso.*—In *Stroud* v. *Bradbury* [1952] 2 All E.R. 76, an appeal by way of case stated to the Queen's Bench Division, the appellant's conviction of obstructing a sanitary inspector in the exercise of his duty was quashed on the ground that 24 hours' notice in writing of intention to enter on the premises belonging to the appellant's wife and carry out thereon certain necessary works, had not been given. The council had merely informed the appellant more than three months before the attempted entry that they intended to proceed under section 290 (6) of the Public Health Act, 1936, that is, the council merely intimated that they intended to carry out the work themselves.

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2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Incorporated charity given discretion to apply funds—implied limitation to charitable objects.—Re Spensley's Will Trusts [1952] 2 All E.R. 49; 1 T.L.R. 1435. It was held in *Re Flinn* [1948] 1 All E.R. 541, that a gift to the Archbishop of Westminster must be interpreted as a gift for religious purposes within his see and not as a gift to the incumbent of his office. In the present case Vaisey J. held on similar grounds that an ultimate trust for such purposes as the National Trust should decide must be construed as a charitable trust since the National Trust would presumably apply either to

their own or related purposes, and the National Trust was an incorporated charity.

(Theobald 283–4.)

Cy-près—general charitable intention.—Re Bradwell's Will Trusts [1952] 2 All E.R. 286; 2 T.L.R. 96. In this case the testator left residuary trust funds to provide for a cottage hospital and provided that surplus income was to be used for a Methodist Endowment Fund for the support of a resident Methodist minister in the town of Bradwell. The funds were insufficient to provide for the hospital so that the primary objective was impracticable. The gift to the Methodists was construed as limited to the proceeds of a trust for accumulation. As more than 21 years had elapsed since the testator's death no further accumulation was permissible (in view of L.P.A., s. 164). Roxburgh J. held that the formulation of the two frustrated trusts showed a general charitable intention and that a scheme should be prepared. *Martin* v. *Margham* (1844) 14 Sim. 230, was relied on. The effect of inflation on old wills is constantly coming into prominence. Old wills should be redrafted today wherever possible. A wider catch-all clause would have secured at least the effectuation of the gift to the Methodist minister. We have previously criticised the rule that a charity cannot be set up if it is not perpetual. Perpetuity is a privilege of charity but it should not be its hallmark. In medieval times it was common to provide in a will for a chantry priest to officiate for a year or a certain number of years, and yet such gifts were considered charitable.

(Theobald 286.)

National Health Service—fund, income of which is being devoted to support of a hospital—discretion of trustees.—Re Galloway [1952] 1 All E.R. 1379. Trustees had power to apply residuary estate to such charitable objects or institutions as they should in their discretion decide. They applied to the court for directions and, in compliance with its order, applied the income of the fund from 1938 to 1948 towards the upkeep of the Preston Royal Infirmary. The Minister of Health claimed the trust fund under the 1946 National Health Service Act. Stone V.-C. (Palatinate of Lancaster) dismissed this claim. The Infirmary was not entitled to the income but was receiving it from time to time under an exercise of the trustees' discretion, guided by an order of the court. A further order might be made, and the discretion might be exercised again. *Re Marjoribanks* [1952] 1 All E.R. 191 (C.A.) was applied. This will was executed long before the 1946 Act but the form used is an interesting circumvention of the statute. The possible applications of the discretionary trust are unlimited, since no estates or interests of any kind are vested in any beneficiary.

(Theobald 283, 289.)

Charity given property with gift over—indirect effectuation of non-charitable object in perpetuity.—Re Martin [1952] W.N. 339. One-half the residue of an estate was left to St. Bartholomew's Hospital on trust to use the income to maintain a grave in a cemetery, a trust which was not charitable and failed for perpetuity, so that the Hospital were held to take the property absolutely. Harman J. treated the trust as a condition. It is true that surplus income was to be held by Barts for themselves so this appears, with respect, a reasonable construction. The law will not allow any of the income to be used so long for the upkeep of the tomb, and Barts took discharged of any liability. However, the testator had added a gift over. Had he made this depend on failure by Barts to carry out the trust the gift over would have been ineffective, as the trust was void for perpetuity. He had, however, objectively expressed the gift over as vesting whenever the tomb happened to fall into disrepair, without specifying by whose fault, if any. The gift over was thus limited on a condition which was independent of the previous void trust. This gift over was held to be valid, on the reasoning of the *Re Chardon* line of cases, Barts taking a determinable interest. Barts must therefore see that the tomb is in fact maintained. The crucial error, it appears, is earmarking specific income for such a purpose. Barts could come to other arrangements for the upkeep of the tomb, using other resources. The result is ludicrous, though a victory for an astute draftsman. The learned judge concluded: "If it seemed odd that a condition which was bad when applied to the gift of income in the first place might come in by way of gift over in the second, that was the kind of subtlety which existed in this branch of the law, and by which he must abide." It is, however, a subtlety which does the law no credit. Legislation clearly applying the perpetuity rule to the reverter on a determinable interest, on the lines of Law of Property Act, s. 4, applying it to estates upon condition, would be a simple solution, and one serving public policy.

(Theobald 412.)

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Will—family provision—consequential adjustments.—Re Jackson [1952] 2 T.L.R. 90. Equity still shows herself capable of producing new doctrines in the limited sphere still left her by legislation. In this case a testator gave his wife an annuity of £150 p.a. which was raised to £600 p.a. after application by her to the court under the Inheritance (Family Provision) Act of 1938. The question now was, how the burden of providing the additional annuity should be adjusted among the persons taking under the will. Since the court had taken the £150 p.a. into account there was no deduction from the provision for the wife. The testator had also directed that £4,000 in legacies should be paid immediately, in priority to other gifts. Roxburgh J. decided that this endowed the legatees of the £4,000 with priority,

like a privileged legacy which escapes deduction for debts under A.E.A., 1925, s. 34, and no deduction was made from them. Bequests of chattels were also privileged. The other gifts in the will were £59,000 and £6,000 under two charitable bequests. It was held that the cost of providing the additional annuity must fall rateably on these funds. A sum of £11,250 was to be set aside to provide the widow's provision under the order of the court, and this would be deducted in the proportion of 59/65 and 6/65. When the widow died or ceased to be entitled to provision under the order, these sums would be accounted for in favour of the charities in the same proportions.

(Theobald 14.)

Will—probate—revocation by mistake—power of court.—Re Swords [1952] 2 All E.R. 281. This case is a rather unsatisfactory decision in the result, owing to the limitations on the powers of the court. A woman executed a will which she deposited with her bank. She retained a draft, which had not been conformed with the final document, and in which the clauses were differently numbered. The testatrix executed a codicil revoking clauses 3 and 5 of the will. It was found that this referred to the draft numeration and not that of the will. Clauses 3 and 5 of the draft were not the same in the will. Clause 3 had already been omitted, on her directions, and clause 5 now became clause 4 of the will. The court was unable to substitute "4" for "5" in the codicil, but it struck out the reference to clause "3" as she had no intention of revoking clause 3 of the final will, which was numbered "4" on her draft.

(Theobald 27.)

Will — revocation — extent — form of revocation clause.—Re Spensley's Will Trusts [1952] 2 All E.R. 49; 1 T.L.R. 1435 (see also Case Notes on Property, and on Charities, *supra*). The testator in this case made provisions for M. B. and for M. B.'s children. He later revoked all provisions made for M. B., as if her name did not occur in the will. It was held that this did not destroy the gift to her children, although their identification would have been impossible if all reference to M. B.'s name had in fact literally been eliminated. There is an interesting guide to solicitors in this report. Vaisey J. indicated that in practice, in many unreported cases as well as reported cases, clauses of revocation in this rather unfortunate form were not literally interpreted, but treated as merely reiterations of the original revocation, in order to save the wanton destruction of other interests, which can hardly have been the testator's intention. *Re Wray* [1951] 1 All E.R. 375, is a recent case where this form of revocation clause was discussed by the Court of Appeal. Revocation clauses are no substitute for new wills. Even in the present case the form of the clause produced difficulties (see Cases on Property, *supra*). A special power of appointment had been held to be a provision "in favour of" the donee of the power in *Re Brough* (1888) 38 Ch.D. 456. Vaisey J. followed this case here, though the form used was "for my niece M. B." One might have imagined that a power of this

kind, as distinct from a general power, was in favour of, or for, the appointees, rather than the donee, and it is hardly clear that a testator would mean to revoke a power in this way. Though, in one sense, a gift " for " is a dative form, as is " in favour," yet " for " would seem to suggest a more direct benefit than " in favour " and it would seem to have been possible to distinguish *Re Brough* on that ground. " In favour " may be construed objectively as covering any provision which in effect turns out to favour someone. " For " seems to refer to the wording of the will. Does the will provide this power " for " the donee or for the appointees? If it be said that the power is, after all, something worth having, can it further be said that it is a " provision " for the donee, who can in no way convert it to her own use? The learned judge's own point of view to the contrary is emphasised by his dictum that he would have held a separate gift to a child of M. B. to be revoked by this revocation clause, if there had been no authority. The lesson for the draftsman is clear.

(Theobald 558.)

Intestacy—claim to administration—practice.—In the Estate of Kaufman [1952] 2 All E.R. 261. Normally, the court will grant letters of administration to the claimant entitled to a grant by the law of the domicile of the deceased. In this case, however, an applicant who was already administrator of the sole heir of the deceased by the law of his domicile was given an English grant, for particular reasons of convenience, under the statutory discretion of the court. Reference was made to Practice Direction of March 1, 1951 ([1951] W.N. 167), and it was pointed out that this is an administrative direction and not actually binding on the courts.

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4. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Compulsory purchase—compensation.—Aston Charities Trust, Ltd. v. *Stepney B. C.* [1952] 2 T.L.R. 6; [1952] 2 All E.R. 228, is a decision as to compensation for compulsory acquisition upon the basis of the cost of equivalent reinstatement. The relevant provision (which has very seldom come before the courts) is Rule (5) of the rules for assessing compensation given in section 2 of the Acquisition of Land Act, 1919. The rule allows compensation to be assessed upon this basis upon two conditions: that the land is " devoted " to a special purpose, and that reinstatement elsewhere is intended. In the present case the property, a church and associated buildings, had largely ceased to be used for church purposes as a result of war damage and of dislocation due to the war; part, indeed, had been let for business purposes. The property having been compulsorily acquired by the borough, the church trustees proposed to build a new church some four miles away. The Lands Tribunal having applied Rule (5), the borough took two questions to the Court of Appeal: can

buildings be "devoted" to a purpose other than that for which they are in fact used; and can a new church, four miles away, be said to be a "reinstatement" of the old one? The Court of Appeal answered the first question in the affirmative, and on the second refused to disturb the Tribunal's decision: it is a question of degree, how far a church can be moved without its purposes losing their identity.

Application for planning permission—position of owner—compulsory purchase—powers of Central Land Board.—Hanily v. *Minister of Local Government and Planning* [1952] 1 T.L.R. 1304; [1952] 1 All E.R. 1293, is another case upon the Central Land Board's powers of compulsory purchase. It decides that an application for, and grant of, planning permission are not invalid merely because the owner of the land concerned did not know of the application and did not want the permission to be granted. (In fairness to local planning authorities, it should be explained that they seldom do decide upon such applications without giving the owner of the land an opportunity to put his point of view forward.) The case also decides that the Central Land Board can buy land and sell it for development, notwithstanding that the owner is willing to sell to another would-be developer. On the other hand, the judge refused to follow the decision in *Travis's Case,* that the Board can make a compulsory purchase order before permission for the development is obtained, so long as they do not actually purchase until the permission is granted: *cf.* 15 Conveyancer 360, at 361.

Previous planning permission—validity.—Thackray v. *Central Land Board* [1952] 1 All E.R. 1374, is yet another case on the transitional provisions of the Town and Country Planning Act, 1947. It decides that planning permission given before that Act only survived it in cases falling within the narrow provisions of sections 77 (1) and 78 (1) of that Act; in particular, consent given in a development agreement made under the old Act did not survive, although the agreement itself remained binding: the point of the dispute being, not that the local planning authority had changed its mind, but that the development concerned, in consequence of the need for a fresh permission, attracted a development charge.

Compulsory purchase—powers of High Court.—Uttoxeter U. D. C. v. *Clarke* [1952] 1 All E.R. 1318, reiterates two points. The fact that property compulsorily acquired for housing purposes is not forthwith used for housing purposes does not necessarily mean that the compulsory purchase order was not genuinely made for housing purposes. And further, even if an order is not made bona fide, the court cannot interfere unless application is duly made to it within the six weeks provided for that purpose by Parliament.

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—subletting without consent—acceptance of rent after knowledge of breach—meaning of "Without the consent of the landlord" in para. (d) of First Schedule of 1933 *Act—implied consent before proceedings began.*—In *Hyde* v. *Pimley* [1952] 2 All E.R. 102, it was held by the Court of Appeal that para. (d) of the First Schedule of the 1933 Act is excluded if at any time before the issue of proceedings, although not necessarily at or before the time of a subletting, the landlord's consent thereto has been given either expressly or by implication. In a case, therefore, where a landlord had accepted rent from a tenant after knowledge of a subletting in breach of covenants, the landlord's right to rely on para. (d), as well as her right to rely on para. (a), was held to be defeated. The landlord's action in accepting rent amounted both to a waiver of her right to rely on the breach of covenant and to a giving of "consent" within para (*d*). As the court came to this conclusion it was unnecessary to decide, and they did not decide, a difficult point based on section 4 (5) of the 1923 Act and section 15 (3) of the 1920 Act, namely, whether, even if the subletting was "without the consent of the landlord," still, since the breach had been waived, such subletting could be regarded as "unlawful." The following expression of opinion by the Master of the Rolls should, however, be noted: "We do not find it easy, on authority or principle, to regard an assignment or underletting of the whole premises by a contractual tenant as being for any purposes "unlawful" if by the terms of the contract there was no restriction on the tenant's power to assign or underlet, or if, the assignment or underletting having been in breach of the tenant's obligations, the breach had been afterwards waived by the landlord."

(Rent Restrictions Guide, 3rd ed., p. 89.)

Rent Restrictions Acts—transfer of burden—covenant to repair—tenant purchases freehold—position of sub-tenant—whether county court judge's decision final and conclusive.—*Beck* v. *Newbold* [1952] 2 All E.R. 412, raised the question of transfer of burden in an unusual form. A, the tenant of a dwelling-house under a lease which placed full repairing liability on the tenant, sublet a flat in the house. B, the sub-tenant, was not placed under any liability to repair by the sub-tenancy. Later A purchased the freehold. B then applied for an apportionment of the standard rent under section 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. At the same time A was allowed to apply for a determination under section 11 of the 1923 Act of the question whether A, having now as owner to bear the burden of repairs previously borne by the tenant, could increase the rent by reason of this transfer of burden. The Court of Appeal held that section 2 (3) of the 1920 Act applied and the "transfer of burden" to the landlord, in the shape of the repairing liability, was a matter which should be taken into account in determining the standard rent. Although there was no transfer of burden *between the parties*, there was a transfer of the burden borne by the tenant the letting to

whom fixed the standard rent: see *per* Lord Porter in *Asher* v. *Seaford Court Estates, Ltd.* [1950] A.C. 508, at 516.

The Court of Appeal drew attention to the apparent conflict between section 2 (6) of the 1920 Act and section 11 of the 1923 Act on the question whether the court had jurisdiction to entertain an appeal from the county court judge's decision under section 2 (3) of the 1920 Act. In view of the concluding words of section 11 of the 1923 Act they held that it was impossible to contend that a question as to an increase of rent under section 2 (3) could not be raised under section 11. The matter involved in the present appeal must be treated as raised under section 11, and, therefore, the court had jurisdiction to deal with it.

(Rent Restrictions Guide, 3rd ed., pp. 55, 62.)

Rent Restrictions Acts—order for possession on ground connected with landlord's personal circumstances—effect of landlord's death before execution of order—enforcement by landlord's devisee.—In *Goldthorpe* v. *Bain* [1952] 2 All E.R. 23, a landlord had obtained an order against a tenant for possession under para. (h) of the First Schedule to the 1920 Act, on the ground that the landlord required the house for a residence for herself and her family. The order was unconditional but execution was postponed for some months. In the interval the landlord died. Her daughter, the devisee of the house, sought to enforce the order. The Court of Appeal, reversing the county court judge, held that she could. The circumstances to be considered in making the order were those existing at the original hearing. Although these included the personal circumstances of the landlord at that time, the order made was not personal to the landlord in the sense that the benefit of it did not enure to her successor in title. To take a different view would be to prevent finality in these cases.

(Rent Restrictions Guide, 3rd ed., p. 92.)

Rent Restrictions Acts—old control and new control—decontrol of whole house—new control applicable—standard rent.—Where the question arises whether a controlled house is subject to " old control " or " new control," it is generally to the landlord's interest to claim that the latter applies, since this would usually provide him with a higher standard rent. In *Stirling* v. *Gilbert* [1952] 2 All E.R. 153, however, the facts were somewhat unusual and the landlord's interest lay in arguing that " old control " applied. The house in question was outside London and its rateable value was at all material times over £20. It was divided into two flats, of which the rateable value of the lower was under £20. There was no evidence of a letting of the house or any part of it before 1928. In that year the lower flat was let at 25s. a week. At the expiration of that tenancy the house was left empty for a time, but in 1937 and subsequently the lower flat was let at 17s. 6d. a week. The Court of Appeal held, affirming the county court judge, that the whole house became decontrolled as a result of section 2 (1) of the 1923 Act. Since the rateable value of the whole house was above £20, it was an " Upper Class B " house, and registration under section 4 (1)

of the 1938 Act was not necessary to preserve the landlord's claim to decontrol. As the whole house had become decontrolled before the lower flat was let, the letting of the lower flat did not attract the provisions in regard to registration and recontrol in default of registration: *Fox* v. *Marshall* [1938] 4 All E.R. 773; *Rynolds* v. *Phillips* (1939) 108 L.J.K.B. 742. The result was that the 1939 Act applied. The standard rent was, therefore, the rent paid in 1937, *i.e.*, 17s. 6d.

(Rent Restrictions Guide, 3rd ed., p. 36.)

Rent Restrictions Acts—tenant not in occupation himself—deserted wife's rights—alleged matrimonial offence—landlord not entitled to rely on it.—The protection of a wife occupying rent-controlled property of which her husband is the tenant is steadily being fortified by a growing body of doctrine. The latest case is *Wabe* v. *Taylor* [1952] W.N. 390. The tenant of a controlled house deserted his wife, who remained in occupation and continued to pay rent. She took in a lodger who, it was alleged, was the father of a child, born to her subsequently, during the continuance of the desertion. The landlord claimed possession, making both the husband and wife defendants. The husband did not appear. It was argued for the landlord that the wife's right to remain in possession, established in such cases as *Old Gate Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311, came to an end when she committed a matrimonial offence. The Court of Appeal had no difficulty in holding that the mere commission of a matrimonial offence was not a matter upon which the landlord could rely. It was a matter between the husband and wife. Assuming that the husband could have revoked the wife's licence to occupy the house, on the ground of the alleged offence, he had not in fact done so. If he had, the landlord might have succeeded in his action.

(Rent Restrictions Guide, 3rd ed., pp. 81, 101.)

Forfeiture—position of sub-tenant—conditions of relief—length of term which may be vested in sub-tenant—comparison of section 15 (3) *of Rent and Mortgage Interest (Restrictions) Act,* 1920, *and section* 146 (4) *of the Law of Property Act,* 1925.—In *Factors (Sundries), Ltd.* v. *Miller* [1952] 2 T.L.R. 194, the county court judge, in granting relief to a monthly sub-tenant on forfeiture of the head tenancy, which was for a term of five years expiring in 1955, vested in the sub-tenant a tenancy for the remainder of the term of the head lease. He also directed that the sub-tenant, who was an assisted person under the Legal Aid and Advice Act, 1949, should, as a condition of the relief granted to him, pay the landlord a sum equal to the party and party costs of the action. The premises were rent-controlled, but as the sub-tenant was not a lawful sub-tenant (there having been a subletting without consent, in breach of covenant) he could not rely on section 15 (3) of the Rent and Mortgage Interest (Restrictions) Act, 1920. The Court of Appeal held that the judge acted properly in granting relief to the sub-tenant, but that, in view of section 146 (4) of the Law of Property Act, 1925, he should not have vested in the sub-tenant a term longer than his own sub-tenancy. A suggestion that section 146 (4) did not prevent the

court from granting, although it prevented the sub-tenant from *requiring* the grant of, a lease for a longer term than the sub-lease was rejected. The condition in regard to the payment of a lump sum was held valid, as this was not an order to pay costs, but to pay a sum equal to costs as a condition of relief, and so was not contrary to section 2 (2) of the Legal Aid and Advice Act, 1949.

It was pointed out that the sub-tenant of a controlled house who gets a tenancy vested in him under section 146 (4) of the Law of Property Act, 1925, may thereby obtain Rent Act protection, although, if he is an "unlawful" sub-tenant, he cannot claim protection under section 15 (3) of the 1920 Act. This may be peculiar, but effect must be given to the provisions of section 146 (4) even if they have peculiar results in the case of controlled properties. Somervell L.J. did, however, observe (*ibid.*, p. 199) that the existence of the Rent Acts and their effect on contractual tenancies when they come to an end by operation of time or by notice to quit is a relevant circumstance for the court to consider in deciding whether or not to grant relief under s. 146 (4).

(Woodfall, 24th ed., p. 935.)

Yearly or weekly tenancy—construction of document—holding over.—In *Adler* v. *Blackman* [1952] 2 All E.R. 41, a tenant held over after the expiry of a tenancy created in the following terms: "To hold for the term of one year to commence from December 22, 1947, at the inclusive weekly rent of £3 payable weekly in advance on Monday in each week during the whole of the tenancy. . . ." After the term had expired the tenant continued to pay the same weekly rent. Ormerod J. held that the tenant held over on a weekly tenancy. The presumption of a yearly tenancy was displaced when account was taken of the following points: (1) that there had been a weekly tenancy between the same parties immediately before the agreement for one year; (2) that the rent during the tenancy for a year was payable weekly; and (3) that the conduct of the parties established that the tenancy was not one from year to year. The conduct referred to included the action of the tenant in serving a notice under section 4 of the Landlord and Tenant Act, 1927, on the footing that his tenancy was a weekly tenancy. Ormerod J. would have been prepared to hold that, even if the tenancy had not been a weekly tenancy, this action by the tenant, which involved the acceptance of a week's notice to quit as valid, precluded him from alleging in the present proceedings that it was invalid.

In deciding as he did, Ormerod J. followed the views expressed by Maugham J. in *Ladies' Hosiery and Underwear, Ltd.* v. *Parker* [1930] 1 Ch. 304, 328, in preference to those of Macnaghten J. in *Covered Markets, Ltd.* v. *Green* [1947] 2 All E.R. 140.

(Woodfall, 24th ed., pp. 272, 277.)

Agricultural holdings—landlord's claim for damages for breach of covenant to repair brought during currency of tenancy—jurisdiction of court—arbitration.—*Kent* v. *Conniff* [1952] 2 T.L.R. 209, is another important decision under the Agricultural Holdings Act, 1948, and should be studied together with *Gulliver* v. *Catt* [1952] 1 All E.R. 929, discussed in these Notes for May-June, 1952, at pp. 227–228. Neither

decision is completely satisfactory. Slade J. in *Kent* v. *Conniff* points out that *Gulliver* v. *Catt* only decided that the compensation provisions of the 1948 Act did not apply; the discussion of the effect of section 57 (3) of that Act was strictly speaking *obiter*. In *Kent* v. *Conniff*, however, the effect of section 57 did arise for decision. It arose in the form of a preliminary point of law, as to whether the landlord could bring an action for damages for dilapidations in connection with an agricultural holding during the currency of a tenancy. The breaches of covenant alleged related to non-repair of buildings on the holding. It was argued that, as a result of section 57 (3) of the 1948 Act, the landlord could not bring an action on this ground during the tenancy, his remedy being postponed until the end of the tenancy. Slade J. held (1) that section 57 (3) did not extend to mere claims for dilapidations to buildings which had no bearing at all on the way in which the farm was worked. Both section 57 (1) and section 57 (3) were limited to deterioration or dilapidation arising from bad husbandry. He also held, however, (2) that even in the case of dilapidations which fell within section 57 (3), there was nothing in the Act to compel the landlord to proceed under that subsection. He could, if he chose, rely instead on his remedy by action for damages in the courts during the tenancy.

There are, with respect, difficulties in these views. It is not clear whether Slade J. considered the effect of section 10 (3) and section 11 (3) of the Agriculture Act, 1947. The joint effect of these subsections is that it would be a breach of the tenant's responsibilities to farm in accordance with the rules of good husbandry if he failed to carry out maintenance and repair obligations in respect of buildings on the holding which he had undertaken in his tenancy agreement. It would, therefore, appear that breaches of covenants to repair buildings on the holding fall within section 57 (3) of the 1948 Act. On the second point, the difficulty is that which was pointed out in the comments made on *Gulliver* v. *Catt* in the Notes for May–June referred to above. If section 57 (3) confers an option only, it is a curious kind of option. It is an option to do in a restricted manner something which the landlord can already do in an unrestricted manner, namely, to make a claim under the covenants of the tenancy. It is hoped that the whole matter will receive further consideration in some later decision. The judgments in *Gulliver* v. *Catt* and *Kent* v. *Conniff* do not quite do justice to the difficulties.

THE LIBRARY

Modern Conveyancing Precedents, Practice and Law : Registered and Unregistered. By A. V. Risdon, assisted by Percival Hancock. London: Sir Isaac Pitman & Sons, Ltd. cxxvi and 1318 pp. (£10 10s.)

This literally massive work has been planned on the same lines as the principal author's *Solicitors and Local Authorities,* which was published earlier this year, and seems to have been well received by the profession. As a book of precedents in the ordinary sense, we will say at once that it adds little, for all its bulk, for an established practitioner with *Prideaux* or *Key & Elphinstone* at his elbow—most of the precedents of deeds follow the usual patterns—but where this book *is* different from the general run, is the inclusion on a large and generous scale of precedents and practical advice on the detailed administration of a general conveyancing practice. As in Mr. Risdon's previous work, the general layout of the book is to provide a brief commentary on the law and practice of a particular matter, and then to follow with precedents of model letters, forms for office use, tables of comparison and the usual more formal precedents of documents. For a young solicitor newly starting a conveyancing practice, the book should prove most useful, although he should appreciate that where the authors are dealing with the more abstruse technical points, their "potted" statements of the law tend to be somewhat too facile, and reference to an established work such as Williams on Vendor and Purchaser will still be necessary; for example, a reference to section 4 of the Mortmain and Charitable Uses Act, 1888, does not suggest that the question of leases to charities is quite so simple as would appear from a perusal of the appropriate paragraph on p. 825.

The book obviously draws on a very large fund of practical experience, and the practitioner who uses it regularly and fully should have his mind directed to most of the "snags" that might possibly arise in the particular transaction, although he would not always find the complete answer to every individual problem—which would probably be too much to expect of any book, even one of this size. The index might have been fuller—some of the page numbers are given with but little indication of what may be expected at the particular reference. Before using the book, however, we would strongly recommend a careful reading of the list of Contents, as only by knowing what to expect in the book will it be possible to make a full use of it in practice.

In practical matters of detail, the book is particularly helpful—*e.g.,* the questions as to the use of the forecourt of a shop on p. 6, the notes on inspecting the property on p. 314 (although we feel that the solicitor should be warned against usurping the functions of a surveyor), the observations on plans on p. 506 (how often have we all suffered from the plan that does not really identify the property at all!), the notes on disputes concerning easements on pp. 444 *et seq.,* and the comments on building contracts (Part XIV). The growing importance of registered land conveyancing is fully recognised—the pages dealing with this subject are not relegated to an appendix, as used to be fashionable in conveyancing works—and extensive treatment of the subject will be found, including a useful (to the tyro) glossary of terms in use (see p. 73). The precedents for registered conveyancing are, however, mostly taken from the Registry's official forms.

Planning matters are dealt with in a separate Part, the wisdom of which arrangement is not obvious, as the authors seem to share our view that the Planning Acts must be taken into consideration in every conveyancing transaction, however simple. We also wonder whether the suggested "Vendor's Planning Declaration" (see Precedent No. 766 on p. 1121), designed as a separate deed supplemental to the conveyance, is a satisfactory means of protecting the purchaser against planning "incumbrances." Apart from the practical difficulty of persuading the vendor to execute such an elaborate and particularised document—admittedly at the cost of the purchaser (see p. 1116)—in most cases it would seem to be quite unnecessary. As a matter of convenience, a simple declaration clause in the conveyance itself (see, *e.g.*, Potter & MacIntyre's Precedents in Conveyancing under the Planning Acts, at p. 79) would in most cases be preferable, thereby avoiding the additional expense and necessity for any separate document.

We cannot profess to have used the book to any considerable extent, and no doubt familiarity with its contents would add to its usefulness, but we wonder whether at times the authors have not made matters too complicated. For example, the average client receiving the questionnaire (see p. 22) designed to obtain all the information necessary to enable his solicitor to act for him on a sale, would probably wish to instruct a solicitor to assist him in completing the form! There is really no satisfactory short cut in taking instructions at the commencement of a conveyancing matter; whenever possible, the solicitor should see his client. Some of the "precedent letters" are scarcely worthy of reproduction—if a solicitor cannot write without assistance such letters as 206 (p. 325), 210 and 211 (p. 327), 315 (p. 386), or 326 (p. 391), he does not deserve to continue in practice.

To sum up, there is no doubt whatever but that there is a great deal of useful matter in this work, and that the price is warranted by the size of the book, but we rather doubt whether such a large expenditure as the purchase of the book entails will be justified for those to whom, after all, this subject is their "bread and butter." This book does not deal with academic theories or abstruse points, but practice, which, to most solicitors, will be second nature.

The book is well printed and produced, strongly and adequately bound, but insufficient differentiation has been made in the format between precedents and comment. Case references are not given in the text (or footnotes), but this defect is compensated for by a full table of cases. The work is not dated exactly, but seems to be up to date, and a loose inset is provided giving the new stamp duties which will come into force on the passing of the Finance Act, 1952 (and *not* as from August 1, 1952, owing to an amendment accepted during the passage of the Bill through the House).

J. F. Garner.

Local Land Charges. Second Edition. By J. F. Garner. 1952. London: Shaw & Sons, Ltd. 158 and (index) 8 pp. (17s. 6d.)

The first edition of this book has proved invaluable to registrars and practitioners, and indeed the Committee on Local Land Charges in its report published in January of this year acknowledged the help received from it. The book gives a concise picture of a complex and sometimes rather haphazard system, and in spite of its brevity contrives to incorporate the detail necessary on a subject almost entirely regulated by statutes and orders. It follows from the very nature of the subject that frequent revision is required to keep pace with the ever-flowing tide of Acts and Orders, and the new edition is mainly designed to bring the book up to date, without any great changes in form or approach, though one or two obscurities in the text have been elucidated.

There remain perhaps one or two points on which the author's views may be challengeable—in particular the statement (on page 37) that conditional permissions or consents granted before July 1, 1948, under a planning scheme or an interim development order are now registrable appears to be too positive (*cf.* the Committee's Report, Appendix, para. 4, referred to on that page); on the other hand, it is surely quite clear that a notice to treat under the normal procedure laid down in the Acquisition of Land (Authorisation Procedure) Act, 1946, is not in itself registrable as an Estate Contract in the (London) Land Charges Registry, whilst it seems very doubtful whether it amounts to a prohibition or restriction on the user or mode of user of property so as to constitute a registrable local land charge, as suggested on page 52 (*cf.* the Committee's Report, para. 19). But these are points on which registrars will wish to err (if at all) on the side of caution.

It only remains to say that intending purchasers of the second edition will have to bear in mind that, if and when the Committee's recommendations are put into effect, there will probably be sufficient changes to make a new edition of this book inevitable. But, as the author says in the Preface, there may be some delay before legislation can be introduced on this subject.

Kerr on Receivers. Twelfth edition. Edited by R. WALTON and A. W. SARSON. Sweet & Maxwell, Ltd. 1952. 429 and (index) 55 pp. (£2 15s.)

This standard work has now, by the death of the late Mr. F. C. Watmough, had its first change in editorship for 40 years and in this new edition the opportunity has been taken both to include a much-needed table of statutes and to re-arrange the contents to some degree. The subject of the appointment of receivers out of court has been given rather fuller treatment and now forms a separate part of the book with a resultant increase in clarity. The needs of those who themselves undertake receiverships, many of whom rely on the book for guidance, have not been forgotten, first in that appendices now set out in full the relevant parts of the Law of Property Act, 1925, the Companies Act, 1948, the Companies (Forms) Order, 1949, and the R.S.C. Ord. 50 and Ord. 51a, and secondly in that one of the joint editors is a chartered accountant. The first of these changes is not of particular value to lawyers except insofar as it panders to their laziness but the second very well may be: a successful receivership is almost always the result of co-operation between lawyers and accountants and the latter have first hand experience of those difficulties which are likely to arise in practice and upon which the former may be asked to advise.

On one small point issue may be joined. At p. 196 it is stated that the appointment of a receiver and manager prima facie determines contracts of service and *Reid* v. *Explosives Co., Ltd.*, 19 Q.B.D. 264, is quoted as the primary authority. That case is unsatisfactory in that the judgments of Lord Esher and of Fry L.J. are in conflict: the latter's view (at p. 269) is that such contracts are not determined unless there are other factors pointing to a determination because it is the duty of a manager to continue rather than to determine contracts. The matter is developed in *Modern Law Review,* Vol. 15, pp. 53–4, and perhaps the editors might give it their consideration before the next edition.

There is no doubt that the present edition which takes in the alterations in the law effected by the Companies Acts, 1947 and 1948, will maintain and enhance the book's high reputation. The printing and binding are tending towards pre-war standards but unfortunately the same cannot be said of the price: but who is to be blamed for that?

G. B. G.

The Conveyancers' Year Book, 1951. Vol. 12. Edited by JAMES A. GIBSON, assisted by C. N. BEATTIE and J. P. WIDGERY, Barristers-at-Law. The Solicitors' Law Stationery Society, Ltd. 1952. 224 pp. and index, cumulative contents of Vols. 7–12, Tables of Statutes, Rules, Cases and Abbreviations. (42s.)

When in 1940 Sir Lancelot Elphinstone added to the Law Library a new work in the form of *The Conveyancers' Year Book,* he made a valuable contribution to the categories of legal literature, supplying what was felt to be a distinctive need, no other publication covering the same ground in the same way. In his preface to the first issue Sir Lancelot stated, "My object in writing this book is to help Conveyancers in bringing their knowledge up to date. . . . I have interpreted 'Conveyancer' in a wide sense as including the gentleman known to the Editor of the *Law List* as an 'Equity Draftsman.' The book will, I hope, be found an adequate guide to the new Law in the year 1939 so far as it affects the Conveyancer or Chancery practitioner." The learned author may be assured that his hopes were fully realised, and although the range of topics dealt with expanded for a time in some of the succeeding issues and in more recent years considerably contracted, certainly right down to the current issue the "pure Conveyancer" (a descriptive term which has grown into becoming definitive), and in some spheres those beyond the range of a practitioner thus denominated, have had their everyday requirements adequately met. In these circumstances the slip issued with the present volume stating that "it is with regret that the publishers announce that the present volume will be the last in the series" expresses a regret which will be very widely shared. When it is added that "it is felt that, valuable as the work has been, contemporary legal literature now covers the ground adequately," the opinion of the publishers in this behalf will not command universal assent. It is, of course, the fact that during recent years the mechanical aids to bringing notice of developments in the law up to date has increased beyond all expectation. In most cases, however, these aids are more communicative than deliberative and one of the most valuable features of the *Conveyancers' Year Book* has been the discussion, brief though that may have been, of current decisions, enactments, methods and practices, and descriptive references to contemporary literature, and all this between two covers. The last point is material, since however much, and not so much, the actual range of the *Conveyancers' Year Books* may be comprised within the pages of a number of serial publications, the fact remains that no single volume plays the part which the series designed by Sir Lancelot Elphinstone sustained, thus leaving the practitioner with the alternative either of obtaining access to what is now a numerous collection of serial publications or of the likelihood of missing points and overrunning the signals through lack of the visible light whereby the way was made clear. If the decision is final, perhaps some of the gaps which the closing down of the *Conveyancers' Year Books* will have caused may be filled by some existent publication, either *pro tanto* or *in toto.*

It is to be hoped that possessors of the set will realise that, notwithstanding its termination, the volumes will continue to serve a most useful purpose for future reference and may even continue to be able to be brought to date by individual effort through some appropriate method of noting up. In particular, the sections on Inland Revenue will prove useful as a key to the existing legislation at the date of issue of the particular volume, a matter of both guidance and time-saving. The present volume in scope is on the more contracted scale that has characterised the series of recent years, not in respect of the treatment of the topics dealt with, but in respect of spheres of the law considered in the earlier issues. Again, the references to current literature, while more considerable than immediately hitherto, are not as exhaustive as in the earlier issues. Nevertheless there are notices and out of

the way sources of information which, in particular, conveyancing counsel will find most helpful. The Editors of this issue are to be congratulated upon a fine piece of work. The present writer joins heartily with those who owe to the learned founder of the work, his collaborators and successors, a deep debt of gratitude, and would take this opportunity of acknowledging it. To each of them as such, and to the *Conveyancers' Year Book* addressed to it objectively, we can join in bidding the greeting "*Ave atque vale*!"

BERTRAM B. BENAS.

We have also received the following:—

The Law Quarterly Review. July, 1952. London: Stevens & Sons, Ltd. 144 pp. (10s.) This issue is of particular interest to those interested in real property. Mr. R. E. Megarry in an article dealing with the matrimonial home and Mr. H. W. Wade in "Licences and Third Parties," subject *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307 and *Errington* v. *Errington* [1952] 1 K.B. 290 to serious and detailed criticism. These, together with certain other recent decisions, have considerably increased the confusion surrounding the law relating to licences and exposed mortgagees' securities to considerable danger. That the Court of Appeal in the latter case did not overlook *King* v. *David Allen, etc., Ltd.* [1916] 2 A.C. 54 and *Clore* v. *Theatrical Properties, Ltd.* [1936] 3 All E.R. 483, as Mr. Wade suggests, seems clear from the judgment of Denning L.J. in *Bendall* v. *McWhirter*.

Unfortunately, neither Mr. Megarry nor Mr. Wade found himself able to give guidance to the conveyancer confronted with problems arising out of the existence of licences affecting land. Sir Lancelot Elphinstone has restated some of the principles governing the assignment of the benefit of covenants affecting land and Dr. R. M. Jackson has written a most interesting and informative article on County Agricultural Executive Committees; he is able to speak with considerable practical experience on a procedure of growing importance.

Proving a Will. Second edition. By D. R. Le B. Holloway, LL.B., of The Principal Probate Registry. 94 + 16 pp. (9s. 6d.) *Companies Limited by Guarantee and Unlimited Companies.* By. J. W. Mayo, solicitor. 56 pp. (7s. 6d). *Summary Maintenance and Guardianship Orders.* By a Magistrates' Clerk. 60 + 11 pp. (8s. 6d.) All Oyez Practice Notes. London: The Solicitors' Law Stationery Society, Ltd. The utility of these three booklets vary considerably. We would have thought that the first of them should have included simple administration, but, in any event, we find difficulty in seeing how such a short booklet can, having regard to the subject, be of great help in practice; on the other hand the mere fact that this is the second edition proves we are wrong. The second booklet is a useful and up to date introduction to a subject that deserves more attention than it usually receives. We agree with the author's doubts whether the view of the Registrar of Companies that a company limited by guarantee may be a private company is correct. For the third booklet, which is rather outside our sphere, we have nothing but praise; it deals with the subject clearly and in sufficient detail for the ordinary practitioner. It is a pity that the price of these booklets has risen so steeply.

The "Oyez" Table of Legal Costs on a Sale of Land. (2s. 6d.) *The "Oyez" Table of Ad Valorem Stamp Duties.* (2s.) London: The Solicitors' Law Stationery Society, Ltd. The former of these includes the scale of building society's solicitor's charges. The latter includes the stamp duties in force on and after July 10, 1952 (the date of the passing of the Finance Act) as well as the scales back to 1892.